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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA

REPORT OF THE PREPARATORY COMMISSION, UNDER PARAGRAPH 11 OF RESOLUTION I OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, ON ALL MATTERS WITHIN ITS MANDATE, EXCEPT AS PROVIDED IN PARAGRAPH 10, FOR PRESENTATION TO THE ASSEMBLY OF THE INTERNATIONAL SEABED AUTHORITY AT ITS FIRST SESSION

VOLUME XII

Statements to the Plenary by the Chairman of Special Commission 3 on the progress of work in that Commission in preparing draft rules, regulations and procedures for the exploration and exploitation of polymetallic nodules in the Area

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
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Second session
Kingston, Jamaica
19 March - 13 April 1984

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

Special Commission 3 was entrusted with the task of preparing rules, regulations and procedures for the exploration and exploitation of the Area (Sea-bed mining code) (document LOS/PCN/27 of 8 September 1983, Annex I, sect. I, para. 1 (c) and sect. III, para. 3).

Towards the fulfilment of this mandate, the Commission held eight meetings during this session. At its second meeting of this session, the Commission adopted its final agenda as contained in document LOS/PCN/SCN.3/CRP.1/Rev.1.

The third and fourth meetings of the Commission were devoted to the consideration of its programme of work. The Commission had before it a discussion paper prepared by the Secretariat, document LOS/PCN/SCN.3/WP.1 and Annex I, containing a detailed list of issues for which the formulation of rules, regulations and procedures is required.

The Commission had also before it document LOS/PCN/WP.17, page 4 and corrigendum 1. During the discussion of the work programme some delegations were of the view that the Commission should proceed with the consideration of items in a "logical and chronological" order set out in Annex I of the Secretariat background paper. Other delegations favoured the approach that the Commission should deal with certain key issues on priority basis. Attention of the Commission was also drawn to the need of co-ordination in some cases of its deliberations with other bodies of the Preparatory Commission.

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The Commission finally adopted its work programme as contained in document LOS/PCN/SCN.3/1984/CRP.2, listing the following four items in respect of which rules, regulations and procedures need to be elaborated:

(a) exploration and exploitation,

(b) prospecting,

(c) scope; and

(d) use of terms.

In adopting the work programme it was understood that the programme merely provided a general framework and would allow for the necessary flexibility. It was also understood that the rules, regulations and procedures to be elaborated in accordance with the mandate of the Commission will deal with prospecting, exploration and exploitation of polymetallic nodules. This understanding is reflected in corrigendum 1 to document LOS/PCN/SCN.3/WP.1. When considering the scope of applicability of the rules, regulations and procedures, the Commission will deal again with this matter and see whether the understanding is still valid.

During the course of the last four meetings, the Commission devoted its attention to the first two sets of issues under the main item "exploration and exploitation" as contained in Annex I to the document LOS/PCN/SCN.3/WP.1, namely the application for approval of plans of work and the content of the application.

This probably is the best place to say that the work of the Commission has been greatly facilitated by the three working papers prepared by the Secretariat, focusing on the questions that the Commission was required to address. For this I wish to express my thanks to the Special Representative of the Secretary-General and his co-operators.

In dealing with the item "application for approval of plans of work" the Commission focused its attention on such matters as the right to apply the submission of applications and their format and applications for reserved areas. With respect to this item, the Commission had before it a discussion paper by the Secretariat, document LOS/PCN/SCN.3/WP.2.

In view of the fact that the Convention itself and resolution II clearly specify the entities entitled to apply there were no differing opinions expressed on this matter. Particular attention was given to the submission of applications by State enterprises or natural or juridical persons or group of the foregoing. Some delegations were of the opinion that these applicants should submit their applications through the sponsoring State. Others expressed the view that these applicants could submit their applications directly to the Authority. The view was also expressed that State enterprises or natural or juridical persons could submit their applications directly provided that at the same time they are sponsored by States Parties.

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There seemed to be a general preference expressing the need to develop a standard model form to be filled out by each applicant.

It should be pointed out that, with regard to other matters under this item, the preliminary exchange of views was inexhaustive and it is difficult at this stage to determine the main trends.

Under the item, "content of application", the Commission discussed such issues as the information to be submitted by an applicant, the nationality of an applicant, control and sponsorship. The Commission had before it a discussion paper LOS/PCN/SCN.3/WP.3, presented by the Secretariat.

There seemed to be general agreement requiring each applicant to submit information identifying it. Much attention was given to the case of partnerships or consortia and particularly to the question whether it is necessary to establish objective criteria for assessing their nationality or the control exercised over them, or to leave these matters to the sponsoring State or States. The discussion of this matter has not been exhaustive and needs to be continued at the next session.

I would like to note also, that in respect of the two sets of issues discussed, attention of the Commission was drawn to joint ventures the Enterprise might enter into with other entities for exploration and exploitation of its areas. Questions arising with respect to the submission of applications and content of applications relating to these entities will require further attention.

For the next session the following method of work was agreed upon. The Commission will first complete discussion of the first two sets of issues, namely the application for approval of plans of work and the content of the application. Thereafter rules, regulations and procedures on these issues will be formulated while consideration of the following sets of issues on the programme of work will begin. These sets of issues contained in Part IV of Annex I to document LOS/PCN/SCN.3/WP.1 related to the payment of fee, the recording and transmittal of applications and the procedure for approval of plans of work.

As requested by the Commission the Secretariat will prepare discussion papers on these sets of issues, which as far as possible, will be sent to delegations in advance of the summer session. As soon as a set of issues has been amply discussed, rules, regulations and procedures relating thereto will be elaborated.

I wish to end this report by thanking the members of the bureau for their valuable suggestions and the members of the Commission for their co-operation, understanding and active participation.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Geneva, 13 August - 5 September 1984

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF THE WORK IN THAT COMMISSION

1. Special Commission 3 held nine meetings during this informal session and conducted its work according to the method agreed upon at the spring session (document LOS/PCN/L.3, page 3, paragraphs 6 and 7). The Commission completed its discussion of Sections I and II of Part IV of the Annex to document LOS/PCN/SCN.3/WP.1, dealing with the application for approval of plans of work and the content of the application and considered draft articles relating to the first set of these two issues, i.e. the application for approval of plans of work. The Commission had no opportunity to start deliberations on two further sets of issues, namely the payment of fees and the recording and transmittal of applications (Sections III and IV of Part IV of the Annex to document LOS/PCN/SCN.3/WP.1). In order to assist the Commission, the Secretariat had prepared two new discussion papers (documents LOS/PCN/SCN.3/WP.4 and WP.5) and two working papers containing draft articles (documents LOS/PCN/SCN.3/WP.2/Add.1 and LOS/PCN/SCN.3/WP.3/Add.1).

The Commission and the Chair are grateful for the valuable contributions of the Secretariat. The discussions in the Commission on the basis of the various documents produced by the Secretariat, including earlier discussions on documents LOS/PCN/SCN.3/WP.2 and WP.3, can be summarized as follows.

2. It was commonly felt that the regulations would need to allow for a degree of flexibility in their application, so as to obviate the necessity of modifying them in the future if the Authority or the operator find adjustments to events warranted. However, the regulations should at the same time provide for stability and should at any rate strike a balance between the interests of the Authority which can be described in terms of effective control, and the interests of an operator which can be described in terms of successfully completing the project.

3. There seemed to be general support for the idea of making the mining code comprehensive, that is to say a document which can be read independently of the Convention and Annex III. There also seemed to be a preference to speak of "regulations" in the mining code, not of "articles".

4. As far as the right to apply to the Authority for approval of plans of work for activities in the Area is concerned, the Commission faced no difficulties. That right can be exercised by the Enterprise or States Parties, state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or by any group of the foregoing. Joint ventures or joint arrangements as referred to in articles 9(2) and 11(1) of Annex III of the Convention were understood to be covered by these two categories of applicants.

5. There seemed to be general agreement that an application by the Enterprise is to be submitted by the Director-General on behalf of the Governing Board, while those of States Parties are to be sumitted through a national body designated for that purpose by the State concerned. There was no general agreement on the submission of an application by state enterprises or by natural or juridical persons. Some delegations maintained their earlier expressed views that applications by these entities could only be submitted by the State or States sponsoring the entities, because these States are responsible for the entities and it would only be proper that they demonstrate this responsibility by submitting the application. It would also be consistent with Rule 2 in document LOS/PCN/WP.16/Rev.1 where it is said that a certifying State may submit an application to the Commission on its own behalf or on behalf of any pioneer investor. Other delegations pointed out that due to differences in economic systems, natural or juridical persons should be allowed to submit their applications directly. In this context reference was made to article 162(2)(j)(i) of the Convention and in particular to the last words of that provision to the effect that a State Party could either make or sponsor an application, implying that in the case of sponsorship the entities earlier referred to can themselves submit an application. The Commission reached no final conclusion on this point.

For the sake of completeness the Chair wishes to point out that in Kingston a third view was expressed according to which the direct submission of applications could perhaps be acceptable provided that the entities directly applying were sponsored by States Parties at the same time (paragraph 6 on page 2 of document LOS/PCN/L.3).

There was no dissenting opinion on the suggestion that applications should be addressed to the Council through the Secretary General of the Authority, the Council passing the application on to the Legal and Technical Commission for its consideration.

6. The Commission was of the view that it would be useful to develop standard forms for the submission of certain data. These forms would be attached to the regulations, but in view of their purely administrative character they could be modified by the administrative body, provided of course the Council had adopted a regulation authorizing that body to make such modifications. Consequently, the Commission should carefully determine what can and cannot be put in the forms.

7. Regarding the time of submission of applications, the Commission concluded that on the basis of article 6(1) of Annex III of the Convention that in normal cases applications could be submitted any time after entry into force of the Convention. The Authority would then take these applications up for consideration six months after entry into force of the Convention, and each fourth month thereafter. In respect of applications by pioneer investors the Commission came to the conclusion, on the basis of paragraph 8(a) of resolution II, that they need to be submitted within six months from the entry into force of the Convention. The Preparatory Commission should deal with the matter of certification of compliance by pioneer investors with resolution II in the year that lapses between the moment that the sixtieth instrument of ratification of or accession to the Convention has been deposited and the actual moment of entry into force.

A different time-frame would apply to applications by a developing State or an entity sponsored or effectively controlled by it for an area reserved for the Enterprise. Such an application can only be made after the Enterprise has decided not to carry out activities in that area. It was suggested that States Parties be notified of such decisions so that they can take action if they so wish. There was no disagreement with the view that the period of six months within which applications by pioneer investors must be submitted does not apply to the two mine sites of the Enterprise referred to in paragraph 9(a) of resolution II.

8. The Commission agreed that an application should contain sufficient particulars to identify the applicant. The particulars should provide answers to the question: who are you and where/to whom do you belong. It was stressed that an application by a state enterprise or by natural or juridical persons should indicate the State or States Parties sponsoring these entities.

9. The issue of nationality or effective control of state enterprises or natural or juridical persons was extensively debated. The debate centred around the question of whether it would be necessary to establish criteria for assessing their nationality or the effective control exercised over them. Some delegations stressed the need to establish criteria, as follows: place of registration, principal place of business, the level of participation by the sponsoring State or its nationals in the capital and management, nationality of the staff and the presence of administrative bodies to control the applicant. In respect of one of the criteria, namely the participation in the capital, it was suggested that the level should correspond to the levels provided by the national legislation for joint companies involving foreign investors. In the view of these delegations such criteria would enable the Authority to determine actual control of the applicant by the sponsoring State(s) which would avoid situations similar to those which now exist in the field of shipping with respect to the use of flags of convenience. The criteria would also serve as a practical guarantee for enforcement of the regulations. Some of those favouring the establishment of criteria considered it also necessary to specify that state enterprises or natural or juridical persons should submit information on their nationality as well as on the control exercised over them.

Other delegations took the opposite view. They pointed out that according to the Convention and particularly to Annex III, these entities only need be sponsored either by the State(s) the nationality of which they possess or by the State(s) exercising effective control over them.

Furthermore, these delegations opposed the establishment of criteria for assessing nationality or control. They said that it would be a difficult if not impossible task given the attempts made in other international fora which were unsuccessful so far, and argued that it would also be unnecessary in view of article 139 of the Convention. A State which decides to sponsor a state or private enterprise, because it has its nationality or is effectively controlled by it, thereby undertakes the obligations laid down in paragraph 1 of article 139. A State would not do so if it had no jurisdiction over the entity in question, because it would otherwise be liable according to paragraph 2 of article 139. It was brought to the attention of the Commission that the key to a possible solution might be found in the reference in paragraph 2 to "all necessary and appropriate measures to be taken by a State Party to secure effective compliance". It was argued that no comparison can be made with the question of flags of convenience in view of the fact that in that case the concept of sponsorship does not exist.

10. Pursuant to article 4(3) of Annex III of the Convention an applicant with more than one nationality or an applicant with the nationality of one State but effectively controlled by another needs to be sponsored by all of the States involved. The Commission did not have sufficient time to discuss these two matters and to assess the practical implications thereof. Equally, the Commission did not have sufficient time to discuss the form in which sponsorship would need to be expressed and the data to be given in that respect. This last point is, of course, related to the question of whether criteria need to be established to assess the nationality of or the effective control over an applicant.

11. There seemed to be general agreement that an application, a plan of work and a contract are closely related. The application would contain information on the applicant and on its capability to carry out the activities proposed in the plan of work. The plan of work would contain information of an operational nature regarding the proposed activities. It was felt that the plan of work can be described as the project, indicating what an operator intends to do and how. It was also felt that while an application and a plan of work are to a certain degree general in nature, the contract needs to be detailed and to spell out the rights and obligations of the Authority and of the operator and consequently it would only seem logical that after submission of an application and a plan of work, and before the granting of a contract, consultations would take place between the applicant and the Authority.

12. In respect of the financial capabilities of an applicant, the Commission was of the opinion that the applicant should provide sufficient information which is specific enough for the Authority to determine whether the applicant is financially capable of undertaking the proposed activities and of fulfilling his financial obligations to the Authority. Some delegations considered that an audited statement or an annual report would not be enough. It was also pointed out that it should be clear that the means of financing is sufficient to cover the estimated development and operating costs and that those estimates are sufficiently elaborated to make that assessment possible. However, this would not mean that the applicant has to show that all costs are covered by guaranteed financing; the financial evidence might also take the form of showing that the applicant can raise the necessary funds. As to the level of disaggregation in reporting the cost estimates, a degree of flexibility was advocated, since disaggregation would come with the development of the project.

13. Some delegations drew the attention of the Commission to the need to make a distinction between applicants as far as their financial capabilities are concerned. Article 4(5) of Annex III of the Convention requires that the procedures for assessing the qualifications of applicants which are States Parties shall take into account their character as States. This should in point of fact hold also for state enterprises. Other delegations maintained that even a State should be asked to provide the Authority with information on financial matters, albeit this information need not necessarily be the same as that required from private companies.

14. There was not much discussion on the nature of the qualification standards relating to the technical capabilities of an applicant. The impression seemed to be that this matter is to a certain extent related to article 5(1) of Annex III of the Convention which requires the applicant to make available a general description of the equipment and methods to be used in carrying out the intended activities (for instance, in respect of exploration, techniques to determine the location, abundance and quality of nodules, methods to measure physical conditions, methods to develop a recovery technology). There was, however, general agreement that the qualification standards on technical capabilities should not make any distinction between an applicant which is a State Party and an applicant which is not.

15. It was recognized that with the exception of pioneer investors, applicants could not cite any previous experience. Consequently, it would be difficult to draft regulations on this issue at this stage. As a matter of fact, any regulation on this point should not be applicable to an applicant with no previous experience.

One delegation observed that previous performance would include good conduct. The conclusion of agreements on sea-bed matters outside the Convention constituted bad conduct and the Commission had to consider whether applications of countries or companies of countries participating in such agreements could be accepted. Another delegation felt that "good conduct" was a moral, not a legal concept.

16. The Commission consented with the views expressed in paragraph 24 of document LOS/PCN/SCN.3/WP.4 on the undertakings by an applicant.

17. The Commission was of the view that exploration and exploitation were related, but nevertheless distinct stages. It would be necessary to establish regulations on various matters relating to each of these two stages. Taking into account that an application ordinarily covers exploration as well as exploitation, it would also be necessary to allow an applicant to amplify the information on exploitation on the basis of findings in the exploratory phase. As to the interval between the stage of exploration and that of exploitation the view was expressed that such an interval should not be fixed, but should be left to consultations between the Authority and the operator. The Commission noted that while Annex III of the Convention allows an application for only one type of activity to be filed, resolutionn II would seem to require pioneer investors to submit an application for both exploration and exploitation, even when that pioneer investor had undertaken exhaustive and conclusive exploration activities. Some delegations felt that when drafting regulations, care should be taken of this different treatment. Others felt that whatever the situation, a pioneer investor would have to submit an application for both stages.

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18. Concerning the duration of exploration and exploitation, there seemed to be general agreement that although at each stage information is being accumulated and used to determine further steps, which might support the conclusion not to establish firm rules and to rely on the judgement of the operator on this question, it might be better to provide time limits in order to prevent "speculation". When setting time limits, it would always be possible to provide for extensions.

19. With respect to the requirement of article 17(2)(b)(iii) that the duration should be short enough to allow the terms of the contract upon renewal to reflect any modification of the regulations of the Authority, it was understood that any change in the contractual terms resulting from such modification could not be made unilaterally, but only with the consent of both parties.

20. On the configuration and size of the total area to be covered by an application, no clear trends emerged. Preliminary reactions seemed to indicate that the number of mine sites in one applicaton will probably be very limited, recognizing that a mine site may consist of a number of mineable areas. It was also pointed out that there is a link between the size of the total area and the requirements for renunciation of parts of the area.

21. After a statement by the observer of the International Hydrographic Organization on the World Geodetic System and some supporting statements by delegations, the Commission agreed to request the International Hydrographic Organization to prepare and present a document with detailed information on the World Geodetic System. By making this request the Commission agreed to specify the World Geodetic System as the uniform system of reference.

22. In respect of the requirement in article 8 of Annex III of the Convention that the total area must be of sufficient estimated commercial value to allow two mining operations, it was noted that this requirement was provided so as to enable the Authority to reserve an area for the Enterprise and not to give the Authority an indication of the economic viability of the area. Some delegations were of the opinion that it was preferable if the reservation of a site could take place after exploration. Others maintained that according to Annex III of the Convention the reservation must take place after prospecting, and that in any case it is in the interest of an applicant to submit as many data as possible since he would not know which part the Authority is going to reserve for the Enterprise.

23. The Commission agreed that in view of the decision to limit the regulations for the time being to polymetallic nodules (see paragraph 2 on page 2 of document LOS/PCN/L.3), it was not necessary to deal now with the question of categories of resources (article 17(1)(b)(iv) and (2)(d) of Annex III of the Convention).

24. The Commission also decided to consider the matter of the quantities of minerals to be recovered when discussing the question of production authorization.

25. The Commission concluded that an applicant may wait to submit a plan of work until the Authority has reserved an area for the Enterprise. Thus a plan of work needs only to be prepared for the area an applicant is actually going to explore and exploit. This conclusion is to be taken into account when the exact contents of an application and of a plan of work are decided upon.

26. As requested by the Commission, the Secretariat will prepare background papers on key issues and draft regulations on the content of an application (on the basis of documents LOS/PCN/SCN.3/WP.4 and WP.5 and of the discussion of LOS/PCN/SCN.3/WP.4), on the procedure for approval of plans of work and, if possible, on the terms of the contract (that is to say on Section V and Section VI, Subsection A of Part IV of the Annex to document LOS/PCN/SCN.3/WP.1). The draft regulations are intended to provide a focus and tool for the deliberations in the Commission. After a thorough examination of these regulations, they will, where necessary, be redrafted under the responsibility of the Chair, taking into account the outcome of the deliberations on each regulation and the various comments and observations made thereon.

The Secretariat is requested to send, as far as possible, the background papers and the draft regulations to delegations in a timely manner, in advance of the next session.

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Third session, Kingston, Jamaica
11 March - 4 April 1985

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 3 held 11 meetings. It accepted document LOS/PCN/SCN.3/WP.6 as the basis for its discussion. In so doing the Commission modified the work programme it adopted at the second session (document LOS/PCN/SCN.3/1984/CRP.2).

2. The Chairman also held two informal consultations on the question of whether the approval of a plan of work should be a one-stage procedure (i.e. submission of one application for the designation of areas as well as for the approval of plans of work) or a two-stage procedure (i.e. designation of an area followed by the submission of a plan of work). On the basis of these consultations the Chairman made some tentative suggestions in order to facilitate the discussion of this subject by the Commission. These suggestions do not reflect the position of any delegation.

3. During the meetings discussions were held on Articles 1 to 11 inclusive and on Articles 16 to 23 inclusive in LOS/PCN/SCN.3/WP.6. It was stressed that the regulations needed to be clear and unambiguous and to leave no doubt as to what an applicant had to do and what the Authority had to do. It was also stressed that the language of the code should correspond as closely as possible with that found in the Convention.

It was also pointed out that the code was a regulatory, not a constitutional document. Although the code may be comprehensive and could be read independently from the Convention, it was not legally independent from the Convention. The point was made that in drafting the regulations the right procedural order should be retained.

4. Article 1 in connection with certain terms in Article 2 gave rise to a discussion of the question whether the mining code should apply only to polymetallic nodules or to other resources. It had been decided to concentrate for the time being on drafting regulations for the exploration and exploitation of polymetallic nodules only. That decision was in accordance with the provisions of article 162(2)(o)(ii) of the Convention. It was, however, felt that it would be desirable to have the code cover all possible sea-bed resources like the Convention. The view was also expressed that while the code could indeed be limited only to the exploration and exploitation of polymetallic nodules, it would not be appropriate to limit it in the case of prospecting, because prospecting would be the means through which an operator would know whether he wished to explore and exploit nodules or any other mineral resource.

5. The discussion on Article 2 (Use of Terms) was of a preliminary nature because it was felt that the need for and exact nature of a definition can only be determined after the substantive regulations of the code have been drawn up. Nevertheless it was suggested that an effort be made not to introduce new terms but rather to use the language of the Convention.

It was also suggested that the definitions under Article 2(21) and (28) needed to be harmonized.

It was considered that the latter part of the definition on prospecting in Article 2(22), beginning with the word "provided", was of a regulatory character, and should consequently be placed in Part II, for instance in Article 10.

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6. With regard to prospecting in general, the main issue was the degree of control by the Authority.

It was recalled that the Convention treated prospecting quite differently from exploration and exploitation as it is not defined as an activity in the Area. Under the Convention prospecting was to be encouraged, and it was therefore to be left unhibited, providing a prospector notified the Authority of its intention to engage in prospecting and undertook to abide by the conditions in articles 143 and 144 of the Convention on training programmes in connection with marine science and technology and by the conditions in article 145 of the Convention with regard to the protection of the marine environment. The Authority's control was limited - and had to remain limited - to the verification of those undertakings. Additional obligations enhancing the control of the Authority would create complex bureaucratic procedures, thereby discouraging rather than encouraging prospecting. This point of view also brought out the fact that prospecting after all did not confer any rights on the prospector in respect of the resources of the Area.

Another point of view spoke of the need for the Authority to maintain greater control of the prospecting activities. It favoured an application by the prospector for the purpose of obtaining permission to prospect. In addition to the undertakings required by the Convention the prospector would have to notify the Authority of the area or areas where prospecting was to take place. Furthermore, verification would have to cover activities in the area or areas where prospecting was taking place. It was also suggested that a fee be levied to cover the costs of processing an application for prospecting.

A third trend seemed to emerge from the discussion. This trend recognized the freedom of prospecting, but counter-balanced that freedom by allowing the Authority to assess fully the efforts of a prospector. Regular reporting could help achieve that.

7. In connection with Article 3 an umbrella clause was suggested aimed at encouraging prospecting. This could be achieved through active disseminiation of prospecting-forms.

With regard to the article itself it was proposed that simultaneously with the notification on prospecting, the prospector should give the Authority the assurance of compliance with the required undertakings.

It was further proposed that notifications should be sent to the Authority by the State Parties, either on their own behalf or on behalf of their entities.

The question arose whether it was appropriate to maintain a provision which would permit the Enterprise to notify the Authority of its intention to engage in prospecting. One point of view was that such a provision was inappropriate since the Enterprise was to carry out activities in the Area, i.e. exploration and exploitation and not prospecting. An opposing point of view was that it would be useful to have such a provision in case the Enterprise developed its own capability to engage in prospecting.

The Commission agreed that the notifications should be addressed to the Secretary-General of the Authority.

8. In connection with Article 4 it was proposed that notifications be required at least 45 days prior to the commencement of prospecting.

9. It was felt that Article 5 should elaborate on the "prescribed form". Another possibility was to attach standard forms to the code (see paragraph 6 of document LOS/PCN/L.11).

10. With regard to Article 6 it was proposed that the words "inter alia" be included in the opening phrase so as not to limit the required information to that mentioned in the Article. However, the proposal met with objections on the grounds that a prospector had to know exactly what the notification should contain.

Opinions varied on the identification of the area to be prospected. One school of thought argued that a prospector should give the Authority the co-ordinates of the broad area in which prospecting was being carried out in order to avoid any overlapping between prospectors or any interference with other activities. Another school of thought maintained that the requirement of co-ordinates went beyond the scope of the Convention and could not be met because of the general nature of prospecting.

The general, information-gathering nature of prospecting was also cited as an argument against the requirement to submit a prospecting programme and to give an indication of the anticipated duration of prospecting. Additionally, it was submitted that information on the method and equipment to be used for prospecting could not be required in their view, because of its highly confidential character. To counter these arguments the importance of those requirements to the Authority for determining whether prospecting could take place was stressed. It was pointed out that the confidentiality of the data submitted could be secured by rules to that effect in the code.

Different views also were expressed on the undertaking to co-operate in the training programmes referred to in articles 143 and 144 of the Convention. It was asked whether those programmes related to marine scientific research and transfer of technology. One point of view was that the technology used in prospecting would determine the technology used in exploration, and information relating thereto would be of importance for the Enterprise. Another point of view argued that articles 143 and 144 were to be understood as referring to co-operation in programmes for marine science and technology.

In this context it was also proposed that in paragraph d(i) of Article 6 the words "marine scientifc research" be replaced by "prospecting", emphasizing that the provisions of articles 143 and 144 are not to be taken literally but are intended to include prospecting. Training and transfer of technology with respect to prospecting were viewed as two interdependent factors and it was argued that one without the other was worthless.

11. Suggestions were made to delete Articles 7 and 8 and to place them in the internal rules of the Authority. Other suggestions favoured the retention of the content of the two articles, but proposed that they be merged.

It was further proposed that Article 7 include a provision to specify the prospecting area in the record.

There were no dissenting opinions on the suggestion that a clear distinction be made between the recording under Article 7 and the one under Article 9(3).

12. Article 9 was criticized for giving the Authority discretionary power it was not felt to possess with regard to prospecting. As part of this criticism, the role of the Legal and Technical Commission was questioned. It was pointed out that in the Convention the Authority plays a passive role in respect of prospecting. According to that school of thought, it would in any event be necessary that a prospector be informed by the Authority within 45 days about his notification. The other view point was that Article 9 was acceptable given the necessity for the Authority to have a certain measure of control over events in the Area. In line with the latter view point it was proposed that prospecting may only begin after a prospector's undertaking to abide by the conditions set out in the Convention had been found to be satisfactory.

In connection with Article 9(2) it was pointed out that while in a given area exploration and/or exploitation may be taking place in respect of a specified category of resources, prospecting in that same area for other categories of resources would still be possible and acceptable, provided it did not interfere with the exploration and/or exploitation already taking place.

13. With regard to Article 10 opinions differed on the limits that should be put on the quantity of minerals to be recovered for testing. One point of view was that the reference to "a reasonable quantity of minerals" was too vague and too conducive to abuse, and a reference to "a minimum scientifically required quantity" that could be verified by the Authority would be preferable. That idea met with objections on the ground that it went beyond the text of the Convention and conflicted with the notion of freedom of prospecting recognized in the Convention.

Another point of view expressed concern about the absence of a time-limit on prospecting. Though recognizing that the Convention so stipulated, it stressed the normal practice whereby prospecting had to be carried out within certain periods that could however be extended. The danger was underlined of prospecting actually becoming exploration.

14. In the opinion of the school of thought that preferred to see prospecting uninhibited, it was felt that Article 11 created unnecessarily bureaucratic procedure and that it went beyond what was required from prospectors by the Convention. In particular, paragraphs 3(a), 3(c), 3(d) and 3(e) it was suggested be deleted.

A contrary view however was that the article struck the right balance between unrestricted prospecting and the minimum of control the Authority must be able to exercise. It was also suggested that more information be included in the reports and that the reports serve to verify the fulfillment of obligations by the prospector.

15. In comparison to the earlier deliberations on documents LOS/PCN/SCN.3/WP.3 and LOS/PCN/SCN.3/WP.3/Add.1 the discussion on articles 16-23 did not provide the Commission with many new ideas on nationality, effective control and sponsorship. It was again proposed that the Authority be enabled to determine actual control of the applicant by the sponsoring State(s). It was again suggested that the effective control a sponsoring State exercised was control according to relevant national laws and practices and that the certificate of nationality or control should constitute conclusive evidence of the matters stated in the certificate.

Concerning Article 18 on sponsorship it was proposed, in line with the provisions of paragraph 8(c) of resolution II, that States whose natural or juridical persons comprise an entity referred to in paragraph 1(a)(ii) of that resolution, should be parties to the Convention. Some reserved their position on the proposal, arguing that among other things it would amount to treating those entities differently from the other pioneer investors referred to in paragraph 1(a)(i) and 1(a)(iii) of resolution II. Therefore, it was agreed that this matter required further discussion at the next meeting of the Commission. In this context it was pointed out that in drafting Article 18 one should also take into account paragraph 8(b) of resolution II.

There was general agreement on the necessity of making it abundantly clear that the provisions in Section 2 of Part III of LOS/PCN/SCN.3/WP.6 were applicable to States Parties, state enterprises or natural or juridical persons as set out in article 153(2)(b) of the Convention.

The Commission agreed to have a further discussion on the provisions of articles 20(g), 21, 22 and 23 in view of their complex nature and their far-reaching consequences. It would in particular be necessary to establish the relation between all elements in article 139 and article 304 of the Convention and article 4(4) of Annex III.

16. At the second part of the third session the work of Special Commission 3 will again be concentrated in the second and third week, with an introductory meeting in the first week and a wind-up meeting in the fourth week.

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One of the first items of consideration at that part of the session might be the one-stage or the two-stage procedure in respect of approval of a plan of work. In considering this item the Commission might make use of the tentative suggestions of the Chairman (see paragraph 2).

Following a decision as to the one-stage or two-stage procedure the Commission would be able to deal with the articles in LOS/PCN/SCN.3/WP.6 corresponding to the stage chosen (either articles 22-44 or articles 22-52 in the Annex). In the course of the deliberations on those articles, the Commission could continue its discussion on the responsibility of a sponsoring State.

17. The Secretariat was requested to prepare for the fourth session draft regulations pertaining to Sections V, VI and VII of document LOS/PCN/SCN.3/WP.1. The Commission requested the Secretariat to send these draft regulations to participants at the end of 1985 so that they could prepare themselves at home with the advice of all departments involved.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Geneva, 12 August - 4 September 1985

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 3 held 10 meetings. It discussed articles 12 to 15 inclusive and 24 to 32 inclusive of document LOS/PCN/SCN.3/WP.6, and some corresponding articles in the Annex to this Working Paper. The Commission also agreed to discuss the question of whether or not an application for the designation of an area and an application for the approval of a plan of work can be considered as two separate applications, i.e. the so-called one or two-stage approach. The Commission did so on the basis of an introductory note by the Chairman which at the request of the Commission was distributed as a Conference Room Paper (LOS/PCN/SCN.3/1985/CRP.4).

2. The views expressed during the discussions are reflected in the following paragraphs. Specific proposals relating to modifications in the text of the articles that have been discussed will be provided in a separate document at the next session.

3. Discussions on article 12 (right to apply) were general in nature. While there still seemed to be general support for the idea that the mining code is a comprehensive document to be read independently from the Convention and Annex III, the need to use language that closely follows those texts was stressed (see paragraph 3 of documents LOS/PCN/L.11 and LOS/PCN/L.16). In this respect and in the case of article 12 reference was made to aligning the relevant provisions in it to that contained in article 153, paragraph 2, sub-paragraph b.

4. In respect of article 13 (time of submission of approval of plans of work), the content of which has been discussed earlier (see document LOS/PCN/L.11, paragraph 7), there seemed to be general agreement that in accordance with the Convention and resolution II at least two situations are envisaged:

(i) "regular" applications that will be submitted following prospecting and for which there will be no time limits; and

(ii) applications by pioneer investors and applications for approval of plans of work for reserved areas are subject to certain time limits.

While there seemed to be general agreement that applications for approval of plans of work in reserved areas can be submitted at any time after such an area becomes available following a decision by the Enterprise that it does not intend to carry out activities in that area, the question raised was whether or not more precise language was required indicating that this type of application was to be submitted only after pioneer investors have obtained approval of plans of work. Questions were also raised as to what would happen if a pioneer investor did not submit an application within six months of entry into force of the Convention. In particular, what would happen to: (i) its status as pioneer investor; (ii) the site allocated to him under resolution II; and (iii) the designated area under resolution II.

The view was expressed that under resolution II a pioneer investor may be granted an extension of time for submission of an application if a certifying State has not ratified the Convention and therefore cannot act as a sponsoring State. In that case, the pioneer investor status would be retained. Another view was expressed that if a pioneer investor is unable to submit an application within the time limit required by resolution II or within the time extended to him under resolution II for reasons other than the non-ratification of the Convention by a certifying State, these reasons should be taken into account by the Authority and some accommodation should be found. Questions were raised as to what would happen to the rights and obligations in respect of the Authority relating to the pioneer area and the area reserved for activities by the Authority through the Enterprise. Another view expressed was that if a pioneer investor failed to submit an application within six months from the entry into force of the Convention, he would lose his status as a pioneer investor and the site allocated to him under resolution II would automatically revert to the international Area and be available to other applicants. The Commission recognized the importance of this question and agreed to have an extensive debate on it at a later stage.

5. In respect of article 14 (submission of applications) the content of which was subject of earlier discussions (see document LOS/PCN/L.3, page 2,and document LOS/PCN/L.11, paragraph 5), there seemed to be general agreement as to the drafting of this article. The view was reiterated that applications by natural or juridical persons, entitled to carry out activities in the Area, should be submitted through the sponsoring State(s). It was also proposed that this article should contain a provision specifying that applications be addressed to the Council through the Secretary-General of the Authority as was done in article 2 of document LOS/PCN/SCN.3/WP.2/Add.1 of 23 August 1984.

6. Regarding article 15 (form of applications) the content of which was discussed earlier (see document LOS/PCN/L.11, paragraph 6), there seemed to be general agreement that applications be submitted in a prescribed form and be in conformity with the requirements of the Convention. It was suggested that the prescribed forms should be annexed to the regulations and this should be reflected in paragraph 1. There were differing opinions on the use of the phrase "the designated representative of the applicant". Concern was expressed that paragraph 3 is drafted in a very general way, and did not cover all cases of submission of applications. For instance, the term "designated representative" would not apply in the cases of applications by the Enterprise and by States Parties. Therefore, it was suggested that more specific language be found to cover all cases. On the other hand the term "designated representative" was thought to be broad enough to cover applications submitted by all applicants envisaged by the Convention and resolution II and that caution should be exercised in order to avoid formulating of provisions that would interfere with the internal processes of designation of a legal representative by an applicant.

7. In connection with the articles referred to, the Commission also considered those articles in the Annex that corresponded with articles 12-15 inclusive, i.e. articles 12, 13, 29, 30, 38 and 39. The discussion of these articles generated no views contrary to those mentioned, except that it was stressed that for a pioneer investor two preliminary conditions are set in respect of his application: registration by the Preparatory Commission and a certificate of compliance with the provisions of resolution II.

8. As to article 24 (financial capabilities) the content of which was discussed earlier (see document LOS/PCN/L.11, paragraphs 12 and 13) there was general agreement that each application should contain sufficient information to enable the Council to ascertain the financial capabilities of an applicant. The differences in opinions centered on the nature of the information and documentation to be provided in applications by natural or juridical persons or groups of entities. A view was expressed that such applicants should submit the specific documentation mentioned in paragraphs 3(c), (d) and (e), supporting the availability of capital, credit or other financial resources to the applicant. A second view suggested that the requirements of article 24 could be fulfilled by the certificate of sponsorship and an amendment was submitted to that effect (document LOS/PCN/SCN.3/WP.7). In view of their concern that the present formulation of the draft provisions in paragraphs 3(c)(ii) and 3(d)(iii) could serve as a facade for the entities from the States not Parties to the Convention that would actually control an applicant and in effect be beneficiaries of the Convention, a request was made for the reformulation of the paragraphs mentioned above to bring them in line with the requirements of the Convention. Some delegations were of the view that the term "pro forma balance sheet" should be deleted from those paragraphs.

9. Regarding article 25 (technical capabilities) the content of which was discussed earlier (see document LOS/PCN/L.11, paragraphs 14 and 15) there was general agreement that an application should contain sufficient information to enable the Council to ascertain the technical capabilities of an applicant. Differences of opinions arose about the precise nature of the information required. It was suggested that a certificate of sponsorship submitted by an applicant would be sufficient proof of the technical capabilities of the applicant to carry out the proposed plan of work. An amendment was made to this effect (document LOS/PCN/SCN.3/WP.7). Another view was that it is up to the Authority to ascertain the technical capabilities of the applicants and every applicant should submit the information as set out in paragraph 2 of article 25. Clarification had to be given on the distinction between the skills and knowledge that are the applicants and the skills and knowledge he receives from other sources. As to the requirement that an applicant should submit a general description of the equipment and methods expected to be used in carrying out the proposed plan of work, it was suggested that proprietary information was not required. It was also suggested that a general description of safety measures should be included and a separate article should be written in the regulations on this subject. It was further suggested that environmental issues involved here should be dealt with in a separate section of the mining code dealing with all environmental issues. Views were expressed on the present drafting of paragraph 2(d), which requires an applicant to submit the curricula vitae of the persons to be responsible for the conduct of the proposed plan of work. The delegations were in agreement that such curricula vitae should only contain information relevant to technical capabilities and to the function they perform. One view stressed that the information submitted to the Authority under paragraph 2(d) cannot be used by the Authority as a pretext to interfere with the process of appointments of employees of the applicant. It was also suggested that an applicant should submit curricula vitae only on persons currently employed, not on future employees.

10. With respect to article 26 (undertakings by the applicant) the content of which was discussed earlier (see document LOS/PCN/L.11, paragraph 16) there were no objections to the text of this article requiring that an application contain the undertakings as provided for in article 4, paragraph 6, of Annex III. It was suggested that applications by the Enterprise need not contain the undertakings in question, since the Enterprise is an organ of the Authority. In connection with this proposal a question was posed about submission of undertakings in the case of the Enterprise acting in a joint venture with other entities. Views were exchanged on this issue. In the context of this article a suggestion was made that subparagraph (b) should be formulated in strict accordance with article 4, paragraph 6, to show that an applicant in his undertakings should accept control by the Authority of activities in the Area as authorized by the Convention. Another suggestion was to draw up the contents of paragraphs (a) and (b) of this article in a standard format. It was further proposed that in respect of the undertaking to comply with the provisions on transfer of technology there be a reference to article 5 of Annex III and to article 144 of the Convention. It was suggested that the undertaking in paragraph (c) should not apply in the case of applications submitted by States.

11. Although the question was raised whether article 27 (previous contracts with the Authority) was really necessary in view of the requirement in article 25, paragraph 2(a), there seemed to be general support for the provision that an applicant who has previously been awarded any contract with the Authority should include in his application some information relating to the contract. Diffference of opinions appeared again in respect of the level of detail of the information to be submitted. One view favoured submission of information indicating in particular the date and reference number of the contract, the date and reference numbers of reports submitted to the Authority in connection with the contract, the date of termination of the contract, if applicable, as well as reasons for suspension or termination of the contract. In their view this sort of information would assist the Authority in ascertaining whether or not the applicant has acted in a good faith in the past. Another view indicated that information on the previous contract would be available in the archives of the Secretariat of the Authority and the Secretariat would have to check its own files and present relevant information to the Council. After all it would be difficult, if not impossible, and redundant for an applicant to submit information that is in the possession of the Secretariat. It was also suggested that such requirements were better inserted in the articles dealing with the procedures for consideration of applications by the Authority.

12. Article 28 (certificate of compliance) did not create difficulties However in order to make the text more precise, a proposal was made that an application by a pioneer investor should be accompanied by a certificate of compliance with the provisions of resolution II and that this certificate be issued by the Preparatory Commission "during the year from the date of deposit of the sixtieth instrument of ratification or accession".

13. As to article 29 (applications for reserved areas) there was general agreement that it should be redrafted to reflect exactly the sequence of possible actions in connection with the submission of applications for reserved areas, as given in article 9, paragraphs 1 and 4 of Annex III. In the context of this article, a request was made that the Secretariat submits draft rules and regulations on such joint ventures.

14. With respect to article 30 (total area covered by the application) the content of which was discussed earlier (see document LOS/PCN/L.11, paragraph 22), a view was expressed that paragraph 1 of this article should be redrafted on the basis of article 8 of Annex III and follow more closely the language of that article. A suggestion was made that this article cover applications for both exploration or exploitation and exploration as well as exploitation. There was concern that the terms used in this article such as "application area", "allocated area" and "environmentally protected area" were not mentioned in the Convention. In this connection one view was that although those terms are new, they nevertheless reflected the intent and language used both in the Convention and Resolution II. Mention was made that paragraphs 3 and 4 contain specific instructions to be followed by the Legal and Technical Commission as well as by the Council when they consider applications. These paragraphs are the legal basis upon which applications can be rejected. Therefore, it was suggested that these paragraphs should be placed in articles 40 and 41 of these Regulations. In the context of this article the Commission, pursuant to its earlier decision (see document LOS/PCN/L.11, paragraph 21) received further information of the International Hydrographic Organization on methods to define the boundaries of marine mining areas.

15. Article 31 (data on the estimated commercial value) generated considerable debate. One school of thought favoured the deletion of paragraphs (b) to (f) inclusive, arguing that the requirements were excessive and uncalled for by the Convention. Another school of thought was of the opinion that the article as drafted, was not only necessary but that it did not go far enough in providing all the data required to establish that the two areas would be of equal estimated commercial value. The Commission had an extensive debate on this issue centering it both on the necessity for additional information and on the types and quantity of information. The additional information requested, included the geotechnical properties of the area, environmental conditions in the area, a brief analysis of the commercial viability of each part of the total area and the methods employed in acquiring the data and the estimated margin of error considered independently for each part. The debate on this article was not conclusive and needs to be continued.

16. The Commission considered the issue of a one-stage or two-stage application procedure, i.e. the question of whether or not the designation of an area and the application for approval of a plan of work should be considered as two separate stages. It was assisted in its consideration by an introductory note of the Chairman, document LOS/PCN/SCN.3/1985/CRP.4. One point of view favoured a one-stage procedure whereby applicants provide plans of work covering both areas of equal estimated commercial value. The main reasons given for favouring this approach were that: (i) the Convention does not allow a two-stage procedure; (ii) the Authority should not be placed at a disadvantage in its knowledge of the particulars of the areas for which applications were made. As the Authority is responsible for the selection of the reserved area, it was felt that it was necessary to have as much information as possible in order to make an informed decision about the selection. In the absence of a plan of work for the two areas, the Authority would have to rely solely on geologic data which would not be sufficient for an assessment of the equal commercial value of both areas. It was also stressed that the one-stage approach would simplify administrative procedures.

A second opinion favoured a two-stage procedure and maintained that the applicant should provide only the data listed in Annex III, article 8. After selection of the reserved area, a plan of work would be submitted for the area that had been designated to the applicant. The reasons given for favouring this approach were (i) that it had a legal basis in the Convention; (ii) that an applicant was not obliged to draw up a plan of work for the Enterprise since the Enterprise was an independent body; (iii) that it was not practical to draw up two plans of work since it was costly and the plan of work for the Enterprise would probably be out of date by the time the Enterprise went into operation.

It was also brought to the attention of the Commission that the selection of areas be done by random selection. This would obviate the need for submission of any data and be the best guarantee for the submission of two areas of equally estimated commercial value.

Related to this issue, questions about the nature of a plan of work were raised as well as about the possibility of having a general plan of work for the designation of areas and a specific plan of work for the area designated as the non-reserved or contract area. These issues were considered to be crucial to any final decision on the issue of one or two-stages.

17. It is suggested that at its next session the Commission continues discussion of the procedure for the designation of an area to an applicant and for the approval of a plan of work and finishes its deliberations on LOS/PCN/SCN.3/WP.6.

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Fourth session
Kingston, Jamaica
17 March-11 April 1986

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the Fourth Session of the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal of the Law of the Sea, Special Commission 3 held meetings 21 through 30. At the first meeting of this session the Special Commission discussed organization of work. It was decided on the basis of the proposal of the Bureau that the Commission would try to finish a first reading of the remaining articles of document LOS/PCN/SCN.3/WP.6, i.e. articles 32-44 dealing with plans of work, fees and processing of applications. It was also recalled that the Commission had not exhausted its consideration of articles 12 to 15 inclusive, particularly article 13, and articles 24 to 31 inclusive.

2. On the basis of the same proposal by the Bureau it was decided that, in order that the Commission not lose time, the members of the Commission would embark concurrently in open-ended informal consultations on the question of whether or not the designation of an area and the application for approval of a plan of work should be considered as one stage or two separate stages. At another meeting it was decided that, inter alia, article 13 (Time of submission for approval of plans of work) could also be usefully discussed as one of the articles of which the Commission had not yet fully exhausted its consideration.

3. As regards the work of the Commission for its next session this summer, I propose that the Commission should commence a discussion on the document on the financial terms of the contract, a paper that the Secretariat is in the process of finalizing and which should be in the possession of delegations some time during the inter-sessional period. I have been assured that this document will be made available as soon as possible so that delegations could familiarize themselves with it before the summer session. If for whatever reason that document or any

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other still being prepared by the Secretariat will not be available before the summer session, I recommend in that case the Commission should take up the draft regulations on production authorization contained in document LOS/PCN/SCN.3/WP.6/Add.1, which was introduced by the Special Representative of the Secretary-General at the 28th meeting of the Special Commission held on Friday, 4 April 1986.

II. ISSUES DEALT WITH IN THE COMMISSION

Part III - Applications for approval of plans of work

Section 3 - Plans of work

4. The Commission embarked on its discussion of articles 32 and 33 (plans of work), during which various suggestions on the relationship between the application, the plan of work, and the contract were made. It was suggested that while the Convention contained provisions on the contents of the plan of work, it was not as clear as to what might be included in the contract.

5. It was also mentioned that the Convention envisages a plan of work for both exploration and exploitation, and that such a plan of work would have to contain data and information required under articles 32 and 33. In such circumstances there might be different phases in the application for a plan of work, in that the results of the exploration stage might have to be submitted in the plan of work for exploitation.

6. Another situation described was an application for both exploration and exploitation after the prospecting stage, where the applicant would submit a two-phase plan of work, whose contents would be different from that required under article 33. It was suggested that in this case a new article covering such an application would be needed.

7. Reference was also made to the relationship between transfer of technology and the plan of work, the need to incorporate indications on training programmes which are mainly linked to operations in the plan of work referred to in both articles 32 and 33, and financial terms of the contract relating to the application fee. Mention was also made of the issue of proprietary information and the hope was expressed that it would not be used to avoid giving the Authority the information it would need.

8. During the consideration of articles 32 and 33, several suggestions were made with regard to the inclusion of the word "plant". One proposal was that since article 5 of Annex III does not mention the word "plant", it should be deleted in both articles. Another maintained that it be retained as drafted because such information on the "plant" is considered essential for the Enterprise, and its omission in Annex III is unintentional. Another suggestion was that it be retained on the understanding that the reference to "plant" in article 32 be interpreted as a "pilot" plant.

9. A further observation is that the divergence of views on the use of the plant is not solely a semantic one; it reflects real concerns that substantive extra obligations are being imposed.

10. It was suggested that the relationship between exploration and exploitation be clarified by narrowing the scope of article 32 and widening the scope of article 33.

11. Other issues raised were that articles 32 and 33 should be made more complete by including provisions on protection of the marine environment and human health and safety, and non-interference with the use of recognized sea-lanes. It was also suggested that plans of work for exploitation should indicate the co-ordinates of the area to be exploited.

A Preference and Priority among applicants

12. The Commission deferred discussion of article 34 since it felt it was misplaced in the text, and decided that it should be considered during the examination of Section 2, i.e. consideration of applications, approval of plans of work and execution of contract.

13. It was proposed that a provision on relinquishment of portions of an area within certain time-limits, as required in Resolution II, paragraph 1(e) be added to the section on plans of work.

Section 4 - Fees

14. It was proposed that a clarification be made to the text of article 35 (fees and costs) to ensure that, if the costs were more than expected, the Authority had the power to demand from the applicant payment of actual costs. It was also suggested that since the Authority will know during its periodical assessments that costs are increasing, it will decide so accordingly.

15. It was maintained that in the case of a single application for both exploration and exploitation a one-time fee should be paid and that an application for a production authorization does not require any additional fee. It was proposed that the operator should only be required to pay for the actual costs of processing its application. A view was expressed that if the application is submitted in two phases, whether the applicant would be required to pay two sets of fees. Any other costs, it was suggested, need to be seen within the overall context of costs of the Authority. A request was also made to clarify the meaning of "supplementary rules and procedures" referred to in paragraph 4 of article 35 and to restructure article 35 so that its present paragraph 4 follows immediately after its present paragraph 1 and that the present paragraph 3 precedes the present paragraph 2.

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PART IV - PROCESSING OF APPLICATIONS

Section 1 - Recording and transmittal of applications

16. As regards article 36 (recording and transmittal of applications), it was pointed out that there should be no distinction between the provisions of paragraphs 3 and 4, that all notifications should be prompt, and that all transmittals should be dealt with in the context of one paragraph. It was also suggested that in paragraph 2(d) the term "the name of each sponsoring state" be replaced by "sponsoring state or states." Another view was to keep paragraph 2(d) in its present form.

17. The discussion on article 37 (acknowledgement of the receipt of the application), raised the issue whether the Secretary-General (of the Authority) would determine if the application was in compliance with the provisions of articles 16 to 32 and whether there was a need for the applicant to be informed of any other application for that same area. It was also pointed out that such information could be considered confidential, and that it would be better if the Secretary-General could give an indication of whether or not there were other applications received without specifying the area applied for.

18. The provisions of article 36, paragraph 4, were discussed in relation to article 38 (safe custody of the application). Article 36, paragraph 4, deals with the list of documents, attachments and annexes to the application, while article 38 deals with the contents of the application.

19. During the discussion on article 39 (confidentiality of data and information), several general proposals governing rules of confidentiality were suggested. Among these were: responsibility for determining the confidentiality of the data and information, the need to regulate access to information, how to determine time periods in which data will be held confidentially, the duty to maintain confidentiality to those who have access to it and sanctions or measures for breaking confidentiality rules.

20. It was also pointed out that while rules of confidentiality could be appropriately applied to individuals in their "professional capacity", such rules were inappropriate in multilateral instruments when applied to individuals in their "personal capacity." Since other fora of the Preparatory Commission were also involved in the drafting of rules relating to confidentiality, it was suggested that consideration of this issue in Special Commission 3 should await developments arising from those discussions.

Section 2 - Consideration of applications, approval of plans of work and execution of contracts

21. During the discussions on article 40 (consideration of applications by the Legal and Technical Commission), it was suggested that a link existed between the provisions of this section and the rules of procedure of the Legal

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and Technical Commission. It was proposed that paragraph 1 of the article, requiring that the Chairman of the Legal and Technical Commission promptly convene a meeting of the Commission upon receipt of the notification of an application, created a number of reasons for concern. First, since article 36, paragraph 3, only requires the Secretary-General to notify the President, the members of the Council, the Chairman and the members of the Legal and Technical Commission of the receipt of an application, at no point before article 40 is there a provision indicating that the Legal and Technical Commission has actually received an application. It was therefore proposed that a provision be introduced requiring the transmittal of the application to the Legal and Technical Commission. Second, it was pointed out that article 40, paragraph 1, was an "in-house" procedure of the Authority. As such it was suggested that it should not be within the Code. Finally, it was proposed that the Chairman of the Commission should not convene a meeting of the Commission to consider a single application but should place the consideration of an application on the agenda for the next scheduled meeting of the Commission in order to avoid excessive meetings.

22. In respect to article 40, paragraph 3, it was proposed, on the one hand, that if the Commission wanted to review previous contracts of the operator with the Authority, then the article could be completed by adding provisions on nationality, control, sponsorship and possible training. On the other hand, it was suggested that, since the paragraph added nothing new to the Code, it could be drastically reduced. Other proposals on article 40, paragraph 3, were as follows:

(1) In connection with paragraph 3(a), it was suggested that the present formulation was vague and needed clarification;

(2) With respect to paragraph 3(b), it was suggested that the present provision be reformulated to be more in line with article 26; and,

(3) In paragraph 3(d), it was thought that the process whereby the Commission made a decision may be too judgemental and so it was suggested that it be reformulated to base it on more objective criteria.

23. As regards article 40, paragraph 4, it was suggested that the applicant may be required only to amend his application rather than to resubmit it.

24. In the discussions on article 40, paragraph 5, it was stated that, if the Legal and Technical Commission was to ensure that proposed plans of work effectively protected human health and safety and protected the marine environment of the area, then the proposed measures to be taken by the operator should be included as requirements of its plan of work. It was also proposed that such measures should include both preventive and remedial actions to be taken by the applicant. Another view was that these elements were unsuitable for consideration at the level of the Legal and Technical Commission. As a result, the suggestion was to delete this provision from the Code, and to include it elsewhere.

25. The discussions on article 40, paragraph 6, centred on the vagueness of and, therefore, the utility of the provision that in reviewing a proposed plan

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of work, the Legal and Technical Commission would, inter alia, take into account the policies and objectives relating to activities in the Area as provided for in the Convention. It was argued that the process of considering a proposed plan of work was not an automatic review resulting in the award of a contract, but one that took place in light of the policies relating to the Area. It was proposed that some precision and completeness be introduced in this provision. Another view was that this provision may create an undue margin of discretion on the part of the Legal and Technical Commission, and therefore the provision should be deleted.

26. Various views were expressed during the discussions on article 40, paragraphs 7 and 8. One view was that, since both provisions were related to the resolution on the "one-stage, two-stage issue", discussions on them would be premature. With regard to article 40, paragraph 8, one view was that, since the Legal and Technical Commission consisted of experts in the fields related to the subject matter, it had no need to avail itself of independent experts. Another view was to delete it from the Code and include it in the rules of procedure of the Legal and Technical Commission.

27. Finally, as regards article 40, it was pointed out that it did not contain provisions relating to the grounds on which the application could be rejected.

28. No substantive remarks were made on article 41. On article 42, a suggestion was made that some time element should be inserted, for example to add "promptly" before "notify."

29. During discussions on article 43 (Contracts for plans of work) the view was expressed that a conceptual difficulty still existed with the plan of work transforming itself into a contract. It was observed that the present formulation gave the impression that after the approval of the plan of work, there was still room for further negotiation. It was proposed that the article should align itself more closely with the terminology of the Convention.

30. No substantive remarks were made on article 44.

III. THE OPEN-ENDED INFORMAL CONSULTATIONS

31. In the informal consultations the issue of a one-stage or two-stage procedure for the application to the Authority for approval of plans of work for exploration and/or exploitation in the Area as well as article 13 (Time of submission for approval of plans of work) were discussed. These consultations were of particular importance since they were of assistance to me, as a new Chairman, in getting fully acquainted with all the characteristics of this thorny issue. It is clear that the purpose of the open-ended informal consultations is not to substitute for the formal meetings of Special Commission 3. I was encouraged by the constructive atmosphere which prevailed throughout the meetings and which was conducive to a frank exchange of views and productive dialogue.

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I felt that there exists a general desire to understand each other's viewpoints. During the meetings I tried to find out what common ground existed and how this could eventually be enlarged. As a newcomer I was pleased to find that there seems to be more common ground than I had expected.

32. At the next session the Commission should continue these open-ended informal consultations in order to assist the Chairman in his efforts at redrafting Working Paper 6 in such a manner that it will approach a universally acceptable text.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
New York, 11 August-5 September 1986

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the summer session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 13 meetings, i.e. 31st to 43rd meetings. The 1st meeting was devoted to a discussion on the organization of work. It was decided, on the basis of a proposal of the Bureau, that the Special Commission would take up discussion of the financial terms of contract contained in document LOS/PCN/SCN.3/WP.6/Add.2 and Corr.1. The Special Commission would initially hold a general exchange of views and then consider the document on an article-by-article basis commencing with article 70 through article 87. While doing so, it should not preclude discussing article 2 - Use of terms, where it relates to the specific articles under discussion. At the end of the article-by-article discussion, delegations would be able to discuss article 2 independently.

2. It was apparent from the onset that owing to the complexity of the subject-matter and the degree of difficulty experienced by most delegations to engage in detailed discussion of its provisions, there was a general feeling that, although the Special Commission could engage in a first reading of the document, the discussion during the present session should not be treated as conclusive. It was also felt that many delegations were in a position to present preliminary views while reserving their right to renew these discussions at a later date.

3. It is my opinion that the Commission has made good progress at the present session in the consideration of the financial terms of contract which are of crucial importance to successful undertakings in the field of deep sea-bed mining. It was obvious during the meetings that delegations made every possible effort to listen to each other, to assess what practical difficulties might exist for actual sea-bed mining and to seek answers to them within the purview of the Convention.

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4. I have greatly appreciated this constructive atmosphere and the apparent willingness of delegations to co-operate with each other and with the Chairman.

5. I have attempted to analyse the discussion before the Special Commission during this session by reflecting below the views of delegations. It is not my intention to present each and every suggestion made since the discussion is not concluded.

II. ISSUES DEALT WITH IN THE COMMISSION

6. At the beginning of the general exchange of views, the Special Representative of the Secretary-General for the Law of the Sea, Mr. Satya Nandan, introduced document LOS/PCN/SCN.3/WP.6/Add.2 and explained some of the concepts underlying the issues dealt within it (explanatory note contained in document LOS/PCN/SCN.3/1986/CRP.5). The Commission then decided to invite two experts who were involved in the drafting of the relevant articles of the United Nations Convention on the Law of the Sea to brief the Commission on how the negotiations at the United Nations Conference on the Law of the Sea led to the results to be found in the Convention. It is my impression that those briefings greatly assisted members of delegations to tackle problems before them.

7. During the article-by-article consideration, the following views, inter alia, were expressed:

PART VI - FINANCIAL TERMS OF CONTRACT

Article 70 - Scope of this part

8. A view was expressed as to whether that article was required at all. It was also queried whether that article should only be limited to contracts for exploration and exploitation or could also be applied respectively to contracts for exploration or to contracts for exploitation. Finally, the question was raised whether that part applied only to contracts or to all other financial activities dealing with exploration and exploitation.

Article 71 - Annual fixed fee

9. It was suggested that the rationale for payment of the annual fixed fee be retained but that the stipulation of $US 1 million be deleted. It was further suggested that with or without such a stipulation, the fee should not be less than $US 1 million. Another view was expressed that in the case of a small-scale operation an annual fixed fee of less than $US 1 million might be charged. As regards indexing, it was observed that 1982 should be treated as the base year, while another opinion expressed the view that the year of the contract should be treated as the base year. On the other hand, it was pointed out that if that system would be used, different contractors would result in making different payments. It was remarked that payments could be made at the beginning and it was

also suggested that payments could be made at the end of the period concerned. It was suggested also that such payments could be made in instalments. As regards the provisions on refunds, it was suggested that such refunds should include any interest accrued on the amount to be refunded.

Article 72 - Choice of financial contribution

10. A question was raised whether the contractor could retain the option to change his choice of financial contribution and whether, in that case, the change should be negotiable. Questions were raised whether the contractor was obligated to notify the Authority of his choice directly or through the contractor's sponsoring State and whether a time-limit should be imposed on the contractor to make his choice.

Article 73 - Production charge

11. It was proposed that, although provisions of that article were based on the Convention, an element of flexibility could be introduced in the application of those provisions. On the other hand, it was pointed out that those specific provisions should not be touched.

Article 74 - Quantity of processed metals

12. The question was raised whether the term "subsidiary rules and procedures" was the correct reference or if it would not be better to refer to them in that as well as in other articles as "financial rules, regulations and procedures". It was suggested that terms such as "supplementary" or "additional" could be substituted for the term "subsidiary".

Article 75 - Average price

13. A view was expressed that that article needed further elaboration. Questions were raised as to what was meant by "representative pricing mechanism" and, if there were more than one terminal market with differing price quotations, which quotation should be used. It was felt that for such cases a more precise definition was required.

Article 76 - Notification of market value and payment of production charge

14. Various views were expressed on the terminology used such as "accounting year", "calendar year", "calendar quarter", etc. It was proposed to establish uniformity of such terms and definitions. It was further suggested that the annual fixed fee be paid in advance, while another view stated that payment should follow production. Another suggestion was that the calculation for the first payment be on the basis of the assessment of the contractor. Reference was also made as to whether the time-limit imposed on payments could be made more flexible.

Article 77 - Authority's share of attributable net proceeds

15. Views were expressed that the rates contained in that article were taken directly from the Convention but it was also suggested that a degree of flexibility might be introduced. A suggestion was made that national tax laws should take into account any payments made by the contractor to the Authority in order to avoid "double taxation". It was also pointed out that the need for appropriate rules on financial incentives should be seen in the context of that article.

Article 78 - Determination of the first and second periods of commercial production

Article 79 - Determination of attributable net proceeds

16. Discussion of those articles developed along the same lines as previous articles to the extent that it concentrated on the use of terms, the need for retaining the rates provided for in the Convention and to what degree flexibility could be injected.

Article 80 - Interest

17. It was suggested that more specificity was required as to the basic criteria for judging what was "reasonable" when establishing the debt-equity ratio.

Article 81 - Recovery of contractor's development costs

18. It was pointed out that there was an apparent contradiction between some of the provisions of that article and some of those in article 78.

Article 82 - Calculation and payment of the Authority's share of attributable net proceeds

19. Similar views as those on previous articles were expressed as to whether the element of flexibility could be introduced on the time-limits for payments. It was submitted that fluctuations in world currencies and conversion to a particular currency might have a considerable impact on payments to be made. A suggestion was made to utilize the special drawing rights mechanism when a contractor made payment as that would be the only way to safeguard the rights of both the Authority and contractor.

Article 83 - Accounting principles

20. Views were expressed that that article needed further elaboration. Similar views as those expressed on article 74 were also presented on the issue of "subsidiary rules and procedures".

Article 84 - Payment to the Authority

21. Various problems were discussed in connection with the situation where a contractor makes payment in the equivalence of processed metals. Those problems included who would bear such incidental costs as marketing, storage, transportation and insurance, etc. and what would happen if the metals remained unmarketed by the Authority.

Article 85 - Selection of accountants

22. Views were expressed for the need to establish clear criteria for the selection of accountants and the procedure to be followed in their selection.

Article 86 - Annual fixed fee to be paid by pioneer investors

23. There was a suggestion to move that article to follow article 71. A question was raised as to how the adjustments referred to in that article would be made.

Article 87 - Settlement of disputes

24. It was proposed to include in that article specific reference to the Sea-Bed Disputes Chamber provisions contained in article 188 of the Convention. On the other hand, it was pointed out that submission of a dispute to commercial arbitration would be sufficient.

Article 2 - Use of terms

25. Although in the general exchange of views and in the course of the consideration on an article-by-article basis many views were expressed on the use of terms and the need for defining more terms, it is my opinion that a full review of the suggestions made on this article as it relates to this part be deferred in view of the decision of the Commission already taken at a previous session to deal with this article at a later date.

III. CONCLUSION

26. As can clearly be seen from what I have just stated, this is a provisional report on the work that the Special Commission has undertaken during the present session. It would, therefore, be highly appreciated if delegations could submit whatever comments they deem necessary in writing to me or to the Secretariat before the end of this session of the Preparatory Commission or during the inter-sessional period.

27. All these views will be taken into account in the preparation of my next report once we have completed the first reading of the proposals contained in document LOS/PCN/SCN.3/WP.6/Add.2 at our next session. If time permits, the Commission should then embark on a discussion of the document on the financial incentives which will bear the reference LOS/PCN/SCN.3/WP.6/Add.3. The Secretariat is in the process of preparing such a document and will make every effort to ensure that it will be in the possession of delegations some time before the commencement of the next session of the Preparatory Commission. In this context, I would also like to recall that the Special Commission has already before it draft articles on production authorization contained in document LOS/PCN/SCN.3/WP.6/Add.1.

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Fifth session
Kingston, Jamaica
30 March-16 April 1987

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

During the 1987 Spring Session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 10 meetings, i.e. 44th to 53rd meetings. Part of the first meeting was devoted to a discussion on the organization of work. On the understanding from the outset that the consideration of LOS/PCN/SCN.3/WP.6/Add.2 during the 1986 Summer Meeting of the Preparatory Commission in New York would be viewed as a preliminary reading of the working Paper and that the Commission would come back for a full reading during the Spring Session of 1987, it was decided, on the basis of a proposal of the Bureau, that the Special Commission would commence its work with a full reading of the financial terms of contract. If there would be any time left, the Special Commission would, as indicated in paragraph 27 of document LOS/PCN/L.38, embark on a discussion of document LOS/PCN/SCN.3/WP.6/Add.3 on Financial Incentives. Due to the complexity of the subject matter and the detailed attention many delegations gave to document WP.6/Add.2, the Special Commission was not able to finish the first full reading of that document.

The Special Commission had a general exchange of views and then considered the document on an article-by-article basis. This article-by-article consideration concluded at this session with article 78. At the Summer Meeting of the Preparatory Commission, therefore, the Special Commission should resume the consideration of LOS/PCN/SCN.3/WP.6/Add.2 with article 78 through article 87. As indicated in my introductory statement on 31 March 1987, delegations would, during the article-by-article consideration, also be allowed to refer in their interventions to article 2 on Use of Terms. After concluding its discussions with article 87, should the need arise, the Special Commission could take a look at the definitions as a whole in order to give delegations an opportunity to discuss definitions which may have been left out.

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The basic working paper before the Special Commission remained LOS/PCN/SCN.3/WP.6/Add.2. In the course of the discussion of that paper amendments as contained in WP.9 were submitted by the delegations of Belgium, Germany, Federal Republic of, Italy, Japan, Netherlands and United Kingdom of Great Britain and Northern Ireland. Throughout the debate, one view was maintained that provisions of the Convention should not be altered in the development of the rules and regualtions for sea-bed mining. On the other hand it was felt that the Special Commission should not mearly repeat the letter of the Convention, but be free to further build on the provisions of the Convention.

II. ISSUES DEALT WITH IN THE COMMISSION

During the article-by-article consideration of document LOS/PCN/SCN.3/WP.6/Add.2 containing draft regulations on prospecting, exploration and exploitation of polymetallic nodules in the Area, the following views, inter alia, were expressed:

PART VI - FINANCIAL TERMS OF CONTRACT

Article 70 - Scope of this part

A view was expressed whether this article should be amended to reflect the fact that even though the Enterprise was exempted for ten years from payments under annex III, article 13 thereafter it was to function under this regime as other contractors.

Article 71 - Annual fixed fee

In connection with the amendment contained in WP.9 to the first paragraph ("each contractor shall pay to the Authority an annual fixed fee of US $ 1 million from the date of entry into force of the contract"), the sponsors of WP.9 were of the opinion that the annual fixed fee of US $ 1 million applied only to contracts for exploration and exploitation or to contracts for exploitation only, but not to contracts for exploration only. As a result the sponsors proposed a lower annual fixed fee for contracts for exploration only, to be negotiated at a later stage. On the other hand it was pointed out that the annual fixed fee of US $ 1 million was also applicable to contracts for exploration only, because under the provisions of the Convention the contractor would acquire an exclusive right to explore and moreover no distinction exists as regards different types of contracts. In this context it was also pointed out that since fees were considered to be a part of the contractor's development costs that were subsequently capitalized when it commenced commercial production, annual fixed fees would apply also to contracts for exploration only.

A proposal was made that in every case where exploration did not lead to commercial exploitation, at least part of the annual fixed fee be refunded to the contractor. Various views were expressed on this proposal. On the one hand it was explained that such a refund could be justified on the basis of the information provided by the contractor for exploration only and in light of the orderly, safe and rational management of the resources of the Area, which the Authority is required to ensure. On the other hand, it was pointed out that such a refund had no basis in the Convention and would allow contractors to speculate by applying for contracts for exploration only.

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In respect of the proposed amendment to paragraph 6, the sponsors of WP.9 stated that in connection with the refund by the Authority to the contractor of the pro rata amount of the annual fixed fee in the event of a postponement, such a refund should be accompanied by interest at the prevailing commercial rates. Other views on this subject were that this would be acceptable if adjustments in payments from the contractor to the Authority would also be accompanied by interest at the same rates. Also, a proposal was made that the introduction of interest payments on either refunds or adjustments would only cause confusion and that therefore no interest should be paid. Paragraph 6 raised other questions, such as, in particular, the reference to "a period of postponement". It was suggested that, since the period of postponement referred to was in connection with issuing a production authorization, this paragraph needed to be redrafted to fully reflect this linkage.

With regard to the proposed amendment contained in WP.9 to paragraph 7 to replace "from the 1982 base year" by "from the year of the approval of the first plan of work as the base year", the view was widely expressed that such an amendment would rationalize the system and ensure that from the first payment of the annual fixed fee, each contractor made equal payments. Another view expressed was that since 1982 was chosen as the base year for indexation of expenditures in pioneer activities in accordance with paragraph 1(a)(i) of resolution II , the same year was to be used for the indexation of the annual fixed fee. It was also suggested that this paragraph be amended to clearly establish the linkage to paragraph 1 and to ensure that the annual fixed fee was paid in advance.

Article 22 - Choice of financial contribution

In introducing an amendment to this article, the sponsors of WP.9 stated that the amendment to replace paragraph 3 with "the contractor's choice may be changed not earlier than ... years after the last choice by notification to the Authority within 90 days of the end of the preceding year, unless the Authority approves a change earlier", had been suggested to allow the contractor to follow different managerial approaches, such as risk-taking management as opposed to risk-avoiding management. Such managerial flexibility might be required for the benefit of the contractor. In this context it was suggested that provisions should be drawn up to ensure that payments required during the first and second stages of commercial production were properly made following each change of system of payment.

Another view suggested that once a contractor made his choice of system of payment, this choice should be considered irrevocable.

Other views were expressed as regards this amendment that by reorienting the procedure as described in paragraph 3 of this article, the control of activities in the Area by the Authority was being eroded and replaced with control by the contractor. It was further stated that the administrative problems that would be caused to the Authority would be wide spread and that it was difficult to envision any circumstances where a switch would be made to the benefit of the Authority. Finally, it was pointed out that in order to make paragraph 3 of this article more responsive to economic realities under the proposed amendment, objective criteria needed to be established on the basis of which the Authority cannot deny the change of system.

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Article 73 - Production charge

To alleviate the concerns that existed with the economic burden that this article imposed on contractors, the sponsors of WP.9 proposed not to specify the percentage charges of the market value of the processed metals produced from the polymetallic nodules recovered from the contract area; these percentages could be determined at a later stage.

Another view, on this article as well as on the proposed amendment, was to maintain this article as is because the percentages included therein were obtained from provisions of the Convention. Possible adjustments could be proposed when discussing WP.6/Add.3 on financial incentives.

In connection with this article and the proposed amendment contained in WP.9 to delete the latter portion of the last sentence "... as a result of the payment of the production charge at 4 per cent," other opinions were expressed advocating the retention of the words. Following a request to the Secretariat for a clarification on footnote no. 43, the Secretariat made changes in the wording of the footnote in all languages except French. However, it was suggested that even with the change the text of the footnote was still not clear and that additional changes may be necessary.

Article 74 - Quantity of processed metals

In the discussion of this article which specifies inter alia, that the Authority shall determine the quantity of processed metals produced and shall set out the procedure on which that determination shall be made, an amendment in WP.9 was introduced to the article giving the contractor the responsibility for determining the production charge. The amendment also provides that the contractor make available to the Authority the data used in making that determination in order for it to verify that the determination was correct. If the two sides could not agree that the quantity was correct within one month, then article 87 of WP.6/Add.2 on settlement of disputes was to apply according to the amendment.

Views on this article as well as on the amendment were varied. On the one hand, it was pointed out that since the Special Commission had to develop the procedure used by the Authority in determining the value of metals produced from the contract area, the proposal was seen as a useful but incomplete step in establishing a set of rules. On the other hand, it was suggested that given the technical complexity of the process of establishing the quantity of metals, the draft rule contained in article 74 was broad enough to provide the Authority with general guidelines. It was pointed out that whereas the draft rule provided the Authority with the general guidelines to elaborate more specific rules and a methodology for determining the quantity of processed metals, the proposed amendment would lessen the role of the Authority.

A view was expressed that the idea of yearly payments of production charges was an interesting one. Another view was that if the determination of the quantity of processed metals was not controlled by the Authority, the system of production authorization would be meaningless. Finally, it was suggested that some provisional payment would have to be made in the case of a dispute between the contractor and the Authority, while the dispute was the subject of a settlement procedure as outlined in article 87 of WP.6/Add.2.

Article 75 - Average price

An amendment was introduced in WP.9 which retains the reference to prices set by international terminal markets and would, in the absence of a pricing mechanism, have the contractor submit a fair price to the Authority. If the Authority disagreed with the contractor, it would according to the amendment consult the contractor, and if consultations were inconclusive, article 87 of WP.6/Add.2 on the settlement of disputes would be applicable. In the view of the sponsors of the amendment, it was intended to avoid bureaucratic delays and difficulties that may arise if the determination of quantity and price were left to the Authority and to create a situation where the Authority and the contractor, as partners in this context, would be on an equal footing. Another view was expressed that the procedure provided for in this article concerned prices established by international markets and the procedure to be followed when no international markets existed. This view was further augmented by the suggestion that although it was quite logical that the contractor provide the Authority with what it considered to be a fair price, the Authority should retain discretion to decide.

Opposing opinions were voiced as regards the amendment. Primarily, the view was stated that the responsibility for making a final determination as to the price had been shifted as a result of the amendment, from the Authority to the contractor. Consequently, it was pointed out that the Authority was being placed in a position subordinate to that of the contractor, a possibility not contemplated in the Convention. Other views in support of this position included the perception that the proposed amendment, seen in the context of the previous article, could create a situation of instability and mistrust between the contractor and the Authority.

Article 76 - Notification of market value and payment of production charge

Many delegations were of the view that this article should be redrafted because it contained discrepancies not only as regards the timing of events but also because the necessary linkages with preceding articles were not taken into account. Most delegations, moreover, felt that this article had to be seen within the context of the two immediately preceding articles, namely article 74 (quantity of processed metals), article 75 (average price) as well as article 71 (annual fixed fee). It was suggested therefore that those articles as well as article 76 be restructured to clearly spell out these linkages.

The sponsors of WP.9 presented an amendment to this article that would permit the contractor to make a single payment in a year within one month of the receipt of notification of the market value of the processed metals rather than make quarterly payments in a calender year.

In the course of the debate a proposal was made suggesting a compromise between the text of this article and the amendment as contained in WP.9. The proposal would provide for yearly payments of the production charge and leave with the Authority the power to determine the production charge on the basis of information provided by the contractor.

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Other issues raised in the discussion of this article included the timing and annual frequency of the payment of the fixed fee and of the production charge; the frequency with which the Authority should notify the contractor of the market value of the processd metals produced from the polymetallic nodules recovered from the area covered by the contract and the frequency required to make a determination of the average price during a calendar year.

Article 77 - Authority's share of attributable net proceeds

The sponsors of WP.9 pointed out that the original article imposed an economic burden on contractors. However, it was suggested that the Authority's share of attributable net proceeds as provided for in the Convention was determined during the Third United Nations Conference on the Law of the Sea following negotiations based on data provided to the Conference in the Massachusetts Institute of Technology study. The view went on to state that actual figures were negotiated to enable potential investors to have the ability to make detailed computations of the benefits they could realize under the régime. The percentages reflected in the text, it was further stated, were formulated on the basis of the contractor's internal rate of return of 15 percent. Additionally, the schedule devised in the Convention, was made incremental to ensure that a higher return implied a higher payment by the contractor, while at the same time taking into account national tax considerations.

Another view expressed was that the provisions of the Convention should not be changed but further developed, in order to guarantee the future success of mining operations.

Other views on the article included queries as to what would transpire if the minimum profitabilities that had been discussed and provided for in the Convention were unattainable and the effects of changing economic realities from the time the provisions of the Convention were formulated.

During the debate on this article, it was suggested that in order to alleviate the concerns with the economic burden imposed on contractors recourse be made to the provisions on financial incentives.

Article 78 - Determination of the first and second periods of commercial production

The debate on this article during this session was of a preliminary nature and it is understood that this debate would continue during the Summer Meeting. The amendment contained in WP.9 among other things would delete the word "directly" from the phrase "research and development directly related to the mining of the resources of the Area", which would in the opinion of the sponsors make the definition less ambigious and allow the application of normal business practice criteria. However, it was felt that the amendment would create a far more ambigious situation generating additional problems and that the retention of the word "directly" would enable the Authority to effectively exercise better cost control.

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III. CONCLUSION

It is my opinion that the Special Commission has achieved substantial progress at this session in the consideration of the financial terms of contract which as I stated last year, are of crucial importance to successful undertakings in the field of deep sea-bed mining. It was obvious during the meetings that delegations made every possible effort to listen to each other, to assess what practical difficulties might exist for actual sea-bed mining and to seek answers to them within the purview of the Convention. I have greatly appreciated this constructive atmosphere and the apparent willingness of delegations to co-operate with each other and with the Chairman.

As I have stated before, I welcome any comments in writing that delegations may wish to submit. In doing so they may facilitate the preparation of a revised version of LOS/PCN/SCN.3/WP.6/Add.2 in the future. In this context I should like to repeat what I have said at various instances during this and previous sessions on the procedure I intend to follow in producing a revised version of the text.

The second reading of the working papers prepared originally by the Secretariat will take place on the basis of a revision prepared by the Secretariat and me, for which revision I will take full responsibility. Revisions on the basis of the second reading of the draft regulations will be prepared in a similar manner, although it may be that we will have to make procedural adjustments as we go along. In this manner the issues which will require negotiations among all interested parties will be narrowed down to the bare but necessary minimum.

When the first revision will appear will depend to a large extent on the progress the Special Commission will be able to make and the time available to the Secretariat and me for the rather time-consuming work of producing a well-balanced text which appropriately reflects all views expressed. I can assure delegations that I will give this matter all due attention.

At the Summer Meeting the Special Commission will continue and hopefully finish the first full reading of WP.6/Add.2 after which it should commence with the consideration of WP.6/Add.3 on Financial Incentives. Time permiting, the Commission could after the consideration of these two working papers take up WP.6/Add.1 on Production Authorization, if by that time no other working paper has been produced by the Secretariat to which the Commission may wish to give priority.

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INTERNATIONAL SEA-BED AUTHORITY
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TRIBUNAL FOR THE LAW OF THE SEA
New York, 27 July-21 August 1987

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1987 summer session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 11 meetings, i.e. the 54th to 64th meetings.

2. The Special Commission continued the consideration, on an article-by-article basis, of document LOS/PCN/SCN.3/WP.6/Add.2 on financial terms of contract commencing with article 78.

3. During the consideration of that document the Special Commission had before it four sets of amendments to the draft financial terms of contract. The first had been submitted at the 1987 spring session by the delegations of Belgium, Germany, Federal Republic of, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland (LOS/PCN/SCN.3/WP.9). During the current session the second set of amendments was introduced by the delegations of Denmark and Norway (LOS/PCN/SCN.3/WP.10), the third set by the Group of 77 (LOS/PCN/SCN.3/WP.11 and Add.1) and, finally, the fourth by the delegations of Belgium, Germany, Federal Republic of, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland (LOS/PCN/SCN.3/WP.12).

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

4. During the continuation of the article-by-article discussion of LOS/PCN/SCN.3/WP.6/Add.2, the following views, inter alia, were expressed:

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Part VI. Financial terms of contract

Article 78. Determination of the first and second periods of commercial production

5. It was pointed out that the definition of cash surplus did not specifically exclude a situation where the cash flow was negative, i.e. a cash deficit which could occur when the operating costs were greater than the gross proceeds received. It was suggested that this would allow the contractor to add his operating losses to the unrecovered development costs. A proposal was made that the definition of cash surplus should be clarified so as to avoid any situation where the cash flow was negative.

6. A view was expressed that it was inappropriate to exclude "interest on loans" in the definition of "return on investment". Since this interest is an additional cost to the contractor it should be taken into account in the calculation of the return on investment.

7. Another view was that the contractor could deduct expenses incurred when calculating net revenue and that the exclusion of interest on loans was the generally accepted accounting practice in line with the respective provisions of the Convention.

Article 79. Determination of attributable net proceeds

8. The sponsors of WP.9 proposed the deletion of subparagraphs (a) and (c) of this article. In their view, the exceptions described in those two subparagraphs were not consistent with the provisions of the chapeau, which contained the general criteria to be followed in calculating attributable net proceeds.

9. In connection with this proposal it was pointed out that the language of subparagraphs (a) and (c) was taken from particular provisions of the Convention, and therefore such a deletion would amount to changing the Convention itself.

10. On the other hand, it was emphasized that the provisions contained in subparagraph (a), according to which the amount of annual attributable net proceeds should not be less than 25 per cent of the contractor's net proceeds, were based on calculations made in the 1970s. It was suggested that there are many questions about the assumptions that went into these calculations. Therefore it was preferred to take into account actual figures when they become known.

Article 80. Interest

11. The intention of the amendment to this article introduced in WP.9 was to enable consultations to take place between the Authority and the contractor if the former considered that the contractor's debt-equity ratio and interest on the development costs, operating costs and development costs of the mining sector did not reflect existing commercial practice. The sponsors of this amendment emphasized that the Authority and the contractor should be on equal footing and should be considered as working in a partnership. Any decision on the debt-equity ratio, if necessary in exceptional circumstances, should be mutually agreed to

between the Authority and the contractor, rather than be unilateral or discretionary. If no agreement could be reached in the consultations, then the case must be submitted to arbitration.

12. A view was expressed that it was not enough just to reproduce corresponding provisions of the Convention in article 80. It was suggested that this article should be much more elaborate and that it should, inter alia, provide for a mechanism to be used in the definition of the debt-equity ratio. It was pointed out that the provisions of the Convention reproduced in this article were drafted under circumstances that differ from those of today and that most financing now comes from loans. Furthermore, terms and conditions of these loans vary widely from case to case. It was also observed that since there is no commercial practice established for polymetallic nodules mining at present, the provisions of article 80 may create an extremely difficult situation for the Authority in that it would have to average out the debt-equity ratios or just simply accept them; this might lead to discrimination among contractors. It was recommended that agreement on this issue should be reached through consultations between the Authority and the contractor.

13. Some delegations expressed the view that the Authority will be empowered to determine whether the debt-equity ratio and the rates of interest were reasonable in each case and this could be achieved by looking at other ventures of comparable risk. It was also recommended that in the initial stages of a sea-bed mining venture interest rates would be established by the contractor but during the latter stages the Authority would be entitled to make the final determination.

14. Another view was expressed that the present draft of article 80 entitles the contractor to borrow as much as possible. Certain limits, it was suggested, must be established in this respect.

Article 81. Recovery of contractor's development costs

15. The amendment contained in WP.9 proposed leaving the timing of the recovery of the contractor's development costs unspecified. The sponsors of the proposal reasoned that because the write-off time on equipment would vary it would be appropriate to leave the timing out at least for the present. Each contractor, it was stated, would model his activities on a certain hypothesis and the range could vary. The amendment was therefore designed to allow flexibility but not to leave the contractor completely free.

16. Another view was expressed that elimination of the timing of the recovery of the contractor's development costs would introduce a degree of ambiguity in the calculation of the attributable net proceeds and there would be no basis for modelling economic assumptions. It was also noted that it was not in the interest of the Enterprise to have rapid recovery because this would affect its net proceeds. Furthermore, the present wording of article 81 ensures a continuous flow of payments to the Authority.

Article 82. Calculation and payment of the Authority's share of attributable net proceeds

17. It was stated by the sponsors that the amendments contained in WP.9 were intended to introduce the notion of an average index for the accounting year into the calculation of return on investment and attributable net proceeds and to simplify the methods of payment of the Authority's share of attributable net proceeds.

18. Some delegations observed that it was necessary to preserve indexing costs but there might be different ways of achieving this. It was suggested that the use of an aggregate index might cause some problems since certain items might decrease over a period of time while others might increase. The solution proposed was the use of several indices. It was stated that it would be difficult to set an average index since calculations might be unavailable at the end of the accounting year.

19. The sponsors of WP.9 stated that the method of quarterly payments laid out in paragraph 3 of this article was rather complex and cumbersome for both the Authority and the contractor and that these kinds of payments were outside the envisaged mechanisms. It was their view that a constant flow of resources to the Authority could be provided on an annual basis.

20. Another view was expressed that deletion of paragraph 3 would mean the elimination of payments to the Authority. A possible solution to this problem could be to develop a system with fewer accounting difficulties. It was proposed, however, that if there was an agreement that payments would be annual then this paragraph could be deleted.

21. Other amendments to article 82 in WP.9 suggested the deletion of the reference to "subsidiary rules and procedures of the Authority" and the reference to the contractor's "interim payment" of a share of attributable net proceeds.

22. While not questioning the need for subsidiary rules and procedures in general, several delegations expressed the opinion that in this case the calculations must be dealt with in enough detail in the present regulations so that there would be no need for more "subsidiary" or other rules in the future. Otherwise, the contractor would find himself in an uncertain situation and unable to make proper decisions regarding investments.

23. According to another view, this reference to "subsidiary rules and procedures" and "interim payment" should be retained and a final decision could be taken at a later stage.

24. An opinion was expressed that the financial data collected by the Authority should not be used solely for the calculation of attributable net proceeds but should also be used for other purposes.

25. The sponsors of WP.9, along with other delegations, emphasized that the determination of the Authority's share of attributable net proceeds should be made in the course of consultations with the contractor so that a mutually agreeable solution could be found.

26. On the other hand, it was maintained that, as provided in the Convention, the Authority will have a definitive role in such a determination.

27. In the course of the consideration of LOS/PCN/SCN.3/WP.6/Add.2, amendments to article 82 as well as to article 76 were introduced by the delegations of Denmark and Norway (document LOS/PCN/SCN.3/WP.10). The sponsors of this proposal expressed the view that the system of interim payments should be replaced by annual payments. In their opinion, the contractor should pay the interest on all outstanding payments after 90 days and all financial data held by the contractor should be made available to the Authority. They shared the view that if the Authority considered the contractor's calculations as not being in compliance with these regulations it should consult with the contractor before making a final determination.

28. Several issues were raised in the initial discussion of WP.10. One concerned the role of the accountants in the verification of a contractor's calculations. The view was expressed that the accountants' decision should be binding for both the Authority and the contractor. Another view was that the Authority will be empowered to make a determination even if it differs from the accountants' decision.

29. Another issue raised in WP.10 dealt with the arbitrator's decisions. The sponsors emphasized that such decisions were binding on both parties and should not require any new procedures or special decision by the Authority.

Article 83. Accounting principles

30. While a number of delegations expressed support for the present draft, other delegations pointed out that article 83 should clearly set out the responsibility of the accountants for ensuring that accounting principles are adhered to.

31. The view was expressed that the words "generally accepted accounting principles and subsidiary rules" represented a deviation from annex III of the United Nations Convention on the Law of the Sea, where the word "subsidiary" was not used.

32. The suggestion was made that this article should fully reflect the respective provisions of the Convention and should not attempt to incorporate wording that could be construed as changing the Convention.

Article 84. Payment to the Authority

33. A number of delegations supported the view that currency payments to the Authority should be standardized and be made in United States dollars.

34. Doubts were expressed in respect of payments in equivalents of processed metals since such a method of payment could be to the disadvantage of the Authority, especially in the event of an oversupply of some of the metals concerned. It was pointed out that, although article 13 (12) of annex III provided an option for this type of payment, current market conditions were such that metals were in ample supply. It was suggested that a provision should be added that the costs for transporting, storing, insuring and selling the processed metals should be borne by the contractor, in the event that such a method of payment was utilized.

35. Another view was expressed that since the Convention provides for such a form of payment it should not be excluded. The Authority and the contractor should act as partners equally interested in the development of the sea-bed. Since any risks would have to be shared, the system of providing guarantees to only one party would not be viable. It was suggested that if such a system were adopted it would stop potential operators from investing capital in sea-bed activities. It was also suggested that under unfavourable market conditions the Authority should provide certain financial incentives to the contractor in order to encourage him to make payments in freely convertible currencies.

Article 85. Selection of accountants

36. The amendment proposed in WP.9 was to delete certain provisions with regard to the Authority's list of accountants, i.e. the obligation of such accountants to refrain from otherwise providing services to any contractor for three years after performing services for the Authority. According to the amendment, a contractor could select any accountant eligible under the national law of the sponsoring State. The sponsors of the amendment emphasized that all accounting firms should be given an equal chance to render their services.

37. The view was expressed that, while the contractor should have the right to select accountants freely, the Authority may approve or disapprove any selection. However, it was pointed out that if the Authority is to be given the task of making selections and maintaining the list of accountants this might necessitate the establishment of additional and rather superfluous bureaucratic mechanisms within the Authority's structure.

38. Several delegations expressed the opinion that a list of 5 to 10 accountants is too limited and restrictive, while other delegations considered that the conditions for nominating candidates were not clear. It was also suggested that the present text did not provide for a choice of accountants representing different economic systems.

39. According to another view, the text of article 85 reflected the respective provisions of the Convention which gives the Authority the right to make such selections. It was recommended that the idea of independent accountants should be retained and the role of the Authority in this respect should not be diminished.

Article 86. Annual fixed fee to be paid by pioneer investors

40. The sponsors of WP.9 proposed to delete this article, since in their view it was a mere repetition of paragraph 7 (b) of resolution II and such a provision on payments by pioneer investors was incorrectly placed in the text on financial terms of contract.

41. On the other hand, it was pointed out that the present text of article 86 should be retained because it was a substantial part of the financial arrangements established by the Convention and resolution II. In future, however, some kind of transitional arrangement in respect of the pioneer investors could be worked out.

Article 87. Settlement of disputes

42. The retention of article 87 was supported by several delegations. It was emphasized, however, that a similar general rule on the settlement of disputes in respect of all kinds of activities covered by the mining code should be formulated.

Article 2. Use of terms

43. In respect of the discussions on the definition of the commencement of commercial production, some delegations pointed out that it was not clear from the definition when an operation could be considered "large-scale" and who is entitled to make the decision as to the scale of the operation.

44. With regard to the definition of "development costs", in particular the requirement as contained in WP.6/Add.2 that such costs should be directly related to the development of the productive capacity of the area covered by the contract, the sponsors of WP.9 proposed deleting the word "directly". Along with the sponsors of the amendment, whose view was that the distinction between a "direct" and an "indirect" expense was difficult to draw, some delegations also pointed out that, in different economic systems, varying criteria are used to define a "direct" expense.

45. Other delegations were of the view that the present definition of "development costs" was appropriate. It was suggested that, by retaining the word "directly" in the definition as had been provided for in the Convention, it limited expenditures to those that were appropriate and it introduced the element of cost control. It was also suggested that the decision on whether or not to retain the word "directly" should be made after a consideration of what constituted "generally accepted accounting principles".

46. In relation to the definitions of "development" and "operating" costs, the sponsors of the proposed amendment to the definition of the term "operating costs" suggested that "the costs of surveying the contract area" should be included in operating costs, thereby providing more clarity. It was also suggested that, since there would be costs expended on "surveying the contract area" even during the period of commercial production, such costs would be better categorized as operating costs.

47. Some delegations expressed a contrary view. They pointed out that they could not support the proposed amendment as a matter of principle since the surveying of the contract area could not be viewed as a day-to-day activity of the contractor but as an activity that resulted in long-term benefits to the contractor. It was maintained that the definitions of "operating" and "development" costs as contained in WP.6/Add.2 reflected this distinction, i.e. recurrent expenditures were seen as "operating costs" while expenditures that resulted in the contractor obtaining long-term benefits were seen as "development costs".

48. In addition, and in connection with the definition of "operating" costs, it was proposed that under employee benefits as defined in the text, a contractor's contribution to pension schemes should be explicitly included. Other views in this regard were that since such contributions are normally included under employee benefits, repeating it could lead to double counting.

Financial incentives

49. The Special Commission then held a general discussion of document LOS/PCN/SCN.3/WP.6/Add.3 (draft regulations on financial incentives) which was prepared by the Secretariat and presented at the 60th meeting of the Special Commission.

50. Views were expressed that financial incentives should be considered as a component of the financial rules. It was pointed out that the financial terms of contract created an unduly onerous burden for the contractor and that the provisions in articles 88 and 89 of document LOS/PCN/SCN.3/WP.6/Add.3 did not provide an adequate solution. What was required before detailed incentives were discussed were clear mechanisms and an institutional framework based on stable and clear criteria and non-discriminatory procedures under which uniform and predetermined incentives would be provided. It was suggested that the provision of such incentives should not be left to the discretion of the Authority but should be provided automatically under specific conditions clearly detailed in advance.

51. According to another point of view, the provision of financial incentives could not be viewed as creating exceptions to the financial terms of contract. It was maintained that the provisions of article 13 of annex III of the Convention must prevail and that the availability of incentives should not become a general rule but should only be awarded at the discretion of the Authority. It was pointed out also that it was important to consider the provision of financial incentives in terms of the revenues of the Authority.

52. It was further suggested that the provision of such incentives should not amount to subsidizing sea-bed mining especially to the detriment of land-based mining.

53. Another view was expressed that a higher degree of security for the contractor could be viewed as a financial incentive. Other additional incentives suggested were, inter alia, a partial or full refund of the annual fixed fee paid by the contractor where exploration does not lead to exploitation of a mine site and the right of the contractor to change his choice of making his financial contribution to the Authority, i.e. by either paying a production charge only or paying a combination of the production charge and a share of net proceeds.

III. CONCLUSION

54. At the end of this summer session, I am pleased to see that the Special Commission was able to conclude its first reading of the draft regulations on financial terms of contract (LOS/PCN/SCN.3/WP.6/Add.2) and its general exchange of views on the draft regulations on financial incentives (LOS/PCN/SCN.3/WP.6/Add.3). The many comments made, amendments submitted and suggestions offered are proof of the active interest delegations take in the substance and their determination to elaborate practical solutions to the questions before them.

55. It was not possible to hold full discussions on the amendments contained in LOS/PCN/SCN.3/WP.11 and Add.1, introduced by the Group of 77, and on LOS/PCN/SCN.3/WP.12 submitted by the delegations of Belgium, Germany, Federal Republic of, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland, nor on the two articles on financial incentives contained in LOS/PCN/SCN.3/WP.6/Add.3. I wish to assure delegations that if they deem it necessary I will set aside time, at the commencement of the 1988 spring session of the Preparatory Commission, to consider these texts.

56. The Special Commission, having reached that phase in its work, will then be in a position to take up a new subject: transfer of technology. I have been informed by the Secretariat that a working paper on this subject will be circulated to all delegations well in advance of the spring session at Kingston. I attach great importance to the fact that delegations are given ample opportunity to prepare themselves thoroughly before leaving their capitals.

57. In order to enable the Special Commission to cope with its heavy work-load and to discharge its mandate fully, I consider it my responsibility to ensure that the Special Commission will have at its disposal a sufficient number of meetings during 1988.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1988 spring session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 13 meetings, i.e. the 65th to 77th meetings.

2. Following the usual practice the Contact Group of the Group of 77 on Special Commission 3 matters utilized some of the time allocated for each meeting of Special Commission 3 for co-ordination purposes.

3. During this session the Special Commission continued its consideration of the amendments submitted to document LOS/PCN/SCN.3/WP.6/Add.2 on financial terms of contract. These amendments are contained in document LOS/PCN/SCN.3/WP.11 and Corr.1 and Add.1 and document LOS/PCN/SCN.3/WP.12.

4. At the penultimate meeting the delegation of Italy, on behalf of the delegations of Belgium, Germany, Federal Republic of, Italy, Japan, Netherlands and the United Kingdom, introduced document LOS/PCN/SCN.3/WP.13, containing suggested amendments to the draft regulations on transfer of technology (LOS/PCN/SCN.3/WP.6/Add.4). There was a brief preliminary discussion of the amendments and it was agreed that they would be considered again at the next session.

5. In its consideration of document LOS/PCN/SCN.3/WP.6/Add.4 on the transfer of technology, the Special Commission began its work by having a general exchange of views on the document. Following that, the Special Commission embarked on an article-by-article examination of the working paper. As was the case with the

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financial terms of contract, it was apparent from the outset that owing to the complexity of the subject matter and the degree of difficulty experienced by most delegations in engaging in detailed discussion of the provisions on the transfer of technology, there was a general feeling that, although the Special Commission could undertake a first reading of the document, the discussion during the present session should not be treated as conclusive. Although many delegations were in a position to present preliminary views, they reserved their right to renew these discussions at the forthcoming summer meeting of the Preparatory Commission.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

6. It was agreed at the summer meeting of 1987 that Special Commission 3 would, if necessary, commence its work by considering more fully the amendments submitted to documents LOS/PCN/SCN.3/WP.6/Add.2, on the financial terms of contract, and LOS PCN/SCN.3/WP.6/Add.3, on financial incentives. The amendments to LOS/PCN/SCN.3/WP.6/Add.2 were contained in LOS/PCN/SCN.3/WP.11 and Corr.1 and Add.1 submitted by the Group of 77 and in document LOS/PCN SCN.3/WP.12 submitted by the Group of 6. The Special Commission did indeed consider these documents, at its 65th and 66th meetings. The amendments contained in document LOS/PCN/SCN.3/WP.12/Add.1, which was introduced by the delegation of Chile on behalf of the Group of 77, relate to draft articles 78 (determination of the first and second periods of commercial production), 79 (determination of attributable net proceeds), 80 (interest), 82 (calculation and payment of the Authority share of attributable net proceeds) and 85 (selection of accountants).

7. The amendments were generally regarded as constructive in nature, but it was felt that, since they had been circulated only at the beginning of the current session, more time was needed for further study.

8. No views were expressed on LOS/PCN/SCN.3/WP.6/Add.3, on financial incentives.

9. At the 67th to 76th meetings, the Special Commission considered a working paper prepared by the secretariat (document LOS/PCN/SCN.3/WP.6/Add.4), containing draft regulations on the transfer of technology until 10 years after commencement of commercial production by the Enterprise. Introducing the working paper, the Special Representative of the Secretary-General for the Law of the Sea, Mr. Satya Nandan, said that the paper had been prepared taking into account the context in which the transfer of technology provisions had been included in part XI of the United Nations Convention on the Law of the Sea, i.e. as part of the parallel system for the development of the resources of the International Sea-bed Area. The provisions of the Convention, he said, included the following key elements: that the obligation of a contractor was a last resort obligation, applicable only if the Enterprise was unable to obtain the required technology on the open market under fair and reasonable terms and conditions; that the obligation could be invoked only during a period of 10 years after the beginning of commercial production by the Enterprise and would cease after the end of that period; and that, if the obligation was invoked, the resulting sale of technology by the contractor was to be at a fair and reasonable commercial price, subject to commercial arbitration.

10. In the ensuing general exchange of views on the working paper, it was felt that the transfer of technology was a complex issue from the legal, technical and political standpoints, and required detailed study. In order to solve the problems involved, delegations would need more information on the availability on the open market of technology for deep sea-bed mining. Consequently, it was suggested that an informal seminar should be held at the summer meeting at which experts could be invited to provide the necessary information.

11. According to some delegations, the provisions on the transfer of technology contained in the Convention - the implementation of which document LOS/PCN/SCN.3/WP.6/Add.4 attempts to clarify and facilitate - were a consequence of the principle of the common heritage of mankind, involving the need to provide the Enterprise with the capability of carrying out operations in the Area in step with operators. These delegations further stressed that the provisions of annex 3 article 5 of the Convention represented a delicate compromise for which they had had to make important concessions at the time of the negotiation of the Convention. The provisions were also considered essential to the parallel system and to the functioning of the Enterprise.

12. In the view of these delegations, the compulsory element for the transfer of technology as contained in the Convention and as reflected in document LOS/PCN/SCN.3/WP.6/Add.4, was essential, given the fact that the technologies in questi were both new and had not yet been commercialized. They also noted that in the absence of compulsory mechanisms for the transfer of technology applicable to the relations between the Authority and operator, the Enterprise could be deprived of required technology and could therefore be impeded in carrying out commercial activities in the Area. According to this view, WP.6/Add.4 was considered a useful basis for discussion.

13. Other delegations, however, had basic reservations regarding some of the provisions contained in the working paper. In their opinion, recourse to compulsory mechanisms to transfer such technology would be unnecessary, since adequate technology would be available on the open market at fair commercial prices and conditions. A system geared to compulsory transfer, they argued, would constitute a strong disincentive to investment and innovation in an area in which incentives were needed, and would not foster the necessary climate for co-operation.

14. It was also observed that since the negotiations leading to the adoption of the Convention, the actual situation in the field of deep sea-bed mining had changed; consequently, the provisions of the Convention and annex III on transfer of technology should now be viewed from a different perspective.

15. It was further suggested that whatever the final content of the draft regulations on the transfer of technology, the mechanisms set forth by the Convention should leave the terms and conditions relating to the use by the Enterprise of the technology contributed by its partners in joint ventures to be governed by the contract between the parties involved. The Preparatory Commission should elaborate a mechanism to reassure the Enterprise that a co-operative spirit would be fostered and that everything possible would be done to make available to it the technology required for deep sea-bed mining activities. The mechanism should also reassure contractors that the technology that had developed at a high cost and that was essential to their ability to compete would not be constrained by actions which were unreasonable or might be imposed on them.

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16. In reference to the principle that the obligation of a contractor was a last resort obligation, applicable only if the Enterprise is unable to obtain the required technology on the open market at a fair and reasonable price, it was stated that there should be effective guarantees of the implementation of that principle, since that provision would not only ensure the interest of the contractor, but was important to the Enterprise as well.

17. Another point of view was that the rules on the transfer of technology were exceptional in nature, and should not be regarded as constituting a precedent. Instead, they should focus on the means of giving the Enterprise an operational basis. To that end, the following conditions were essential:

1. the technology to be transferred must be strictly limited to that used by the operator in the Area;

2. the technology transferred must be for the use of the Enterprise;

3. the transfer must be on fair and reasonable commercial terms, and when a dispute arose established practice must be followed; and

4. the applicability of the rules on the transfer of technology should be limited in time.

18. The view was expressed that the transfer of technology had economic aspects and legal ramifications, since those who engaged in deep sea-bed mining would have to bear certain risks and hope that the cost would ultimately be borne by consumers. Furthermore, as in other mining ventures, the possibility of additional costs would have to be anticipated.

19. It was suggested that, since the risks involved in deep sea-bed mining were higher than those of conventional mining, it was very doubtful that such risks would be borne by operators whose goal was economic success. It was further suggested that much depended on the purpose and design of the rules to govern the transfer of technology: the more they were designed for co-operation and mutual trust, the more they would gain acceptability.

20. Some other delegations stated that they had difficulty in accepting all the provisions contained in the working paper because the availability of technology on the open market did not constitute a guarantee that the Enterprise would be able to obtain the technology it required, and might prove to be an illusion. Developing countries which had tried to obtain technology on the open market had found it difficult to do so because of the conditions imposed, and it was feared that the same would apply to the Enterprise. Therefore, in practical terms, the compulsory elements for transferring technology were essential.

21. The view was expressed that the objections to the compulsory transfer of technology on the grounds that it would create a disincentive were not valid. The Enterprise would have to follow a public international tendering procedure: in situations where it could acquire technology on the open market no problems would arise, and if the Enterprise received the technology on fair and reasonable terms and conditions, there would be no need to invoke the undertakings of contractors. It was also pointed out that the provisions of annex III, article 5 of the Convention constituted a "safety net", and the objections were therefore unfounded.

22. The view was also expressed that there was some degree of uncertainty as to the exact purpose of the working paper: since it reproduced the contents of annex III, article 5 of the Convention, its main purpose was perhaps two-fold - to devise a certain procedure for obtaining technology and to introduce a new element dealing with limitations on undertakings of the contractor imposed by national law.

23. Some delegations placed emphasis on the possibilities of transferring technology in the framework of joint ventures where technology would be shared by the partners involved. That would, it was felt, be the most effective means of transfer of technology, and would afford good opportunities for the Enterprise to obtain the required technology for its first operation.

24. On the other hand, it was suggested that unless the financial and management features were initially worked out, such joint ventures might lead to situations which would be detrimental to the interests of developing countries as well as the Enterprise.

Article-by-article examination: Part VII. Transfer of technology

Article 90. Scope of these regulations

25. Suggestions were made to widen the scope to cover the activities in the Area as defined in part XI and annex III of the Convention. The view was expressed that the regulations should include processing technology, since processing was an integral part of exploitation. Other delegations pointed out that, while that was true, the transfer of technology provisions of the Convention and annex III excluded processing technologies because, at the time they were drafted, it had been felt that processing technology was readily available in both industrialized and developing countries, so that there was no need to include provisions for its transfer. Moreover, it was pointed out that if questions

arose regarding the acquisition of such technology, a meeting of States parties could be convened (annex III, art. 5, para. 5) and that processing technology had been excluded as part of the final compromise on the transfer of technology provisions, and to include it would be tantamount to revising the Convention.

26. It was also suggested that the provisions contained in article 97 (3) regarding transfer of technology in the case of a joint venture with the Enterprise should be included in article 90 as a new paragraph.

27. Another suggestion was that the scope should be expanded to include other minerals in the deep sea-bed. However, it was pointed out that article 162 (2) (o) (ii) of the Convention gave clear priority to regulations dealing with polymetallic nodules and that furthermore, the Special Commission had previously debated the issue and had decided to focus only on polymetallic nodules.

Article 91. Use of terms

28. There were suggestions that the definition of "technology" be placed before the draft article on scope, possibly in article 2 (Use of terms) of LOS/PCN/SCN.3/WP.6.

Article 92. Undertakings in contracts on transfer of technology which the contractor is legally entitled to transfer

29. Article 92 gave rise to a discussion on the role of the Council. Some delegations felt that since the provision in the Convention upon which the draft article was based referred to the Authority, the reference to the Authority should be retained. Some felt that since the contract was between the Authority and the contractor, the Authority should request the contractor to fulfil its obligations on transfer of technology. The Enterprise should not be subjected unnecessarily to decision-making by a political organ such as the Council, which could result in lengthy delays. Since the decision was of a technical nature, invocation of the undertakings could be perceived as an administrative matter to be dealt with by the Secretary-General.

30. Another point of view was that the regulations should elaborate and specify functions, not simply reproduce the Convention, and that the Council was the proper organ to handle decisions with such serious implications. Others felt it was important to clarify which organ was responsible for specific types of decisions; since the Enterprise was required to act in accordance with the policies of the Assembly and was subject to the directives of the Council, the Council was the appropriate organ in the present case. Still others suggested that the issue could be resolved when the relationship between the Council and the Enterprise was examined in the context of annex IV.

31. The view was expressed that the phrase "fair and reasonable commercial terms and conditions" required further clarification and elaboration.

Article 93. Undertakings in contracts on transfer of technology which the contractor is not legally entitled to transfer

32. With respect to the role of the Council, views similar to those put forward during the discussion of article 92 were expressed.

33. Some delegations felt that the contractor should be required to provide, at the time the contract was concluded, an assurance from the owner of the technology that the owner would transfer it. Others doubted the relevance, if that was done, of the provision requiring the Enterprise to go to the open market: rather, it should be required to go to the open market only for technology that the contractor was legally entitled to transfer.

34. Others stated that all possibilities for acquiring technology on the open market must have been exhausted before the obligations of the contractor could be invoked; that would apply to all cases when technology was requested.

Article 94. Procedure for obtaining technology

35. The view was expressed that the procedures contained in the article were too lengthy and cumbersome, and could immobilize the Enterprise. While the introduction of some procedure was necessary, it should be simplified: consultations between the Enterprise and the contractor were suggested as a possible mechanism.

36. Others stated that it was essential to provide a clear procedure for taking decisions, and that the draft article was a useful point of departure for elaborating a procedure.

37. The same points regarding the substitution of the Authority by the Council made in the discussion of articles 92 and 93 were reiterated in the consideration of article 94.

Article 95. Undertakings in contracts with respect to transfer of technology for the benefit of developing States

38. Some delegations expressed the view that the undertakings should not be limited to technologies used in exploitation only, but should cover the full scope of activities in the Area. It was further noted that developing States should be given the same benefits and have the same status as the Enterprise regarding transfer of technology. On the other hand, it was stated that the Convention and annex III embodied a delicate compromise in respect of the conditions under which developing countries would enjoy the same privileges as the Enterprise regarding the transfer of technology.

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Article 96. Procedure for obtaining technology by developing States

39. It was pointed out that the views previously stated on article 94 applied to article 96 as well.

Article 97. Limitations on undertakings

40. Some delegations felt that article 302 of the Convention was not an adequate legal basis for article 97. Furthermore, its application would limit the undertakings excessively, and could create further obstacles to the transfer of technology to the Enterprise or to developing States. Any limitation on undertakings based on national security should be certified at the beginning of the contract. Such certification would then disallow the use of a particular technology in the Area. That procedure would preserve the parallel system.

41. Other delegations suggested that the national security limitation was unnecessary and that the provisions be deleted. If technology could not be transferred, then it should not be used by the contractor in the Area.

42. Another point of view expressed was that there was a need for such a provision. It was suggested that the draft article be elaborated either to qualify the certificate or to add some provision that the State must make alternative technology available to the Enterprise.

43. Other delegations suggested that security limitations on transfer of technology would exist whether or not the Special Commission wrote regulations on them, and that this practice was accurately reflected in the draft regulations.

Article 98. Notification of revisions

44. The question was raised how a 90-day time-limit had been determined. It was suggested that the timing should be carefully considered and that notification of revisions should take place before the new technologies were used in carrying out activities in the Area.

45. The view was expressed that the article provided for a clearly administrative task which, it was felt, would more appropriately be discharged by the Secretary-General of the Authority.

46. It was suggested that the relationship of the Enterprise to research and development be examined in the context of innovations and improvement in technology.

Article 99. Disputes concerning a contractor's undertakings

47. The observation was made that the draft article differed from annex III in that, while it increased the number of parties to which the article would apply to include the owner of the technology, the reference in annex III to developing States had been omitted.

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Article 100. Disputes concerning other undertakings required by these regulations

48. It was noted that the draft article did not stipulate which organ of the Authority would be empowered to suspend or terminate the contract in case of violation of the undertakings.

Article 101. Consultation by a group of States parties

49. The view was expressed that the article was inconsistent wit the scope of activities covered by the draft regulations, as defined in article 90, in that it included, in addition to exploration, recovery and processing.

III. CONCLUSION

50. Special Commission 3 had before it a working paper on a subject, i.e. transfer of technology, which is of prime importance to the functioning of the parallel system for the exploration and exploitation of the deep sea-bed. The subject matter is not free from controversy. It is therefore especially gratifying to be able to note that the Special Commission considered the working paper, in a preliminary first reading covering all the articles, in a business-like manner and a friendly atmosphere.

51. This preliminary first reading will assist delegations in preparing themselves for the summer meeting which will be devoted to a full first reading of LOS/PCN/SCN.3/WP.6/Add.4 and amendments submitted to it. On the basis of such a full first reading the Chairman will be in a position to prepare, in co-operation with the secretariat, a revision of LOS/PCN/SCN.3/WP.6/Add.4 in the future. In this context I may refer to what I have said on the procedure in my report to the plenary on 15 April 1987 (LOS/PCN/L.46, chap. III, paras. 3 and 4).

52. In the course of the past two years I have been preparing, with the help of the secretariat, a revision of LOS/PCN/SCN.3/WP.6 concerning applications for approval of plans of work. I have requested the Secretary of the Special Commission to take measures for the publication of that document in the inter-sessional period. At an appropriate time in the future, not necessarily during the summer meeting, the Special Commission should consider this revised working paper at a second reading.

53. Since the conclusion of the first reading of LOS/PCN/SCN.3/WP.6/Add.2 concerning the financial terms of contract, I have, together with the members of the secretariat, also made good progress in revising that text. In my opinion both LOS/PCN/SCN.3/WP.6/Rev.1 and LOS/PCN/SCN.3/WP.6/Add.2 as eventually revised, will be useful tools for the Special Commission in establishing a universally acceptable régime for deep sea-bed mining. Document LOS/PCN/SCN.3/WP.6/Add.3 concerning financial incentives as part of the chapter on financial terms of contract will not be submitted to a revision for the time being since no suggestions for any appreciable changes of the text have been made at the first reading.

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54. As for the question what the Special Commission will take up after it has finished the full first reading of LOS/PCN/SCN.3/WP.6/Add.4, I wish to remind delegations of the fact that LOS/PCN/SCN.3/WP.6/Add.1 containing draft articles on production authorization is still pending before the Commission. It is, moreover, my understanding that the secretariat will continue the drafting of articles on any of the remaining issues mentioned in LOS/PCN/SCN.3/WP.1 and Corr.1, which document is still the basis of our work.

55. Let me take this opportunity to thank all those involved in the work of Special Commission 3 for the co-operation and friendship they have extended to me. It has made my task as Chairman easy and rewarding.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
New York, 15 August-2 September 1988

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 OF THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1988 summer meeting of the Preparatory Commission, Special Commission 3 held 10 meetings, i.e., the 78th to 87th meetings.

2. Following the usual practice of the Contact Group of the Group of 77 on Special Commission 3 matters, the Group utilized for co-ordination purposes some of the time allocated for meetings of Special Commission 3.

3. It will be recalled that at the spring session at Kingston, Special Commission 3 conducted a general exchange of views on the draft regulations on the transfer of technology (LOS/PCN/SCN.3/WP.6/Add.4). Following this exchange of views the Special Commission embarked on a preliminary article-by-article examination of the working paper. Owing to the complexity of the subject-matter and the degree of difficulty experienced by most delegations in engaging in detailed discussions of the provisions on the transfer of technology, it was agreed that the Special Commission would undertake a full first reading of the document during the summer meeting in New York. Therefore, during the current summer meeting the Special Commission commenced its full first reading of document WP.6/Add.4. Concurrently, the Special Commission also considered a document containing the suggested amendments submitted by the delegations of Belgium, the Federal Republic of Germany, Italy, Japan, the Netherlands and the United Kingdom (LOS/PCN/SCN.3/WP.13/Rev.1).

4. The consideration of those documents will be reported in part III of the present paper under the issues before the Special Commission. Many of the statements made during the current summer meeting went over the same ground covered during the spring at Kingston. Therefore I would suggest that delegations should read the present paper in conjunction with what was reported in my statement to

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plenary at the end of the Kingston session (LOS/PCN/L.59). This will obviate the need to discuss once again matters dealt with at Kingston. Therefore in the present report only those issues that were discussed for the first time during the summer meeting will be reflected.

5. Prior to the consideration of the above-mentioned documents the Special Commission held a seminar on "Current Status of Developments in Deep Sea-Bed Mining Technology", organized by the Secretariat following a request by a number of delegations at the 1988 spring session at Kingston. The seminar was conducted over a period of three meetings of the Special Commission, i.e., the 78th to 80th meetings.

II. SEMINAR ON CURRENT STATUS OF DEVELOPMENTS IN DEEP SEA-BED MINING TECHNOLOGY

6. The seminar was devoted to different aspects of deep sea-bed mining technology, inter alia, its development, availability on the open market, its future designs and perspectives and mechanisms for its transfer. Speakers included experts in various fields related to deep sea-bed mining from Brazil, Canada, Cuba, Finland, France, Federal Republic of Germany, India, Norway, the Union of Soviet Socialist Republics and Zambia. The experts made their presentations in their personal capacity on the basis of their expertise and did not necessarily reflect the views of their delegations or Governments.

7. The seminar was intended in part to assist the work of Special Commission 3 which has the responsibility to draft the rules and regulations regarding the transfer of deep sea-bed mining technology. I am of the opinion - and I am sure that this opinion is shared by many delegations who attended the seminar - that it proved a very useful tool in providing valuable information on the issue of deep sea-bed mining technology. On behalf of the members of the Special Commission, I wish to thank all the experts who participated in the seminar.

8. The seminar commenced on the morning of 18 August 1988 with the first topic, "A general overview of sea-bed mining technology requirements and mining systems under development", which was discussed by Mr. Jean-Pierre Lenoble from the Institut Français de Recherche Pour l'Exploitation de la Mer (IFREMER), France. The second topic was "Prospecting and exploration technologies: Availability on the open market and technology under development". The subject was covered by Mr. Sergei Shlykov of the Ministry of Geology of the Union of Soviet Socialist Republics and Mr. Ivan Glumov, Chief of the Department of Mineral Resources of the Sea and Oceans in the Ministry of Geology of the Soviet Union. It was also considered by Mr. Pekka Laxell, the Executive Vice-President of Rauma-Repola, one of the biggest publicly owned, non-subsidized industrial enterprises in Finland. Mr. Laxell was joined by his colleague Mr. Pertti Pale, General Manager of the Ocean Mining Unit of Rauma Repola. In the afternoon meeting, the seminar considered the issue of "Technology for mining of polymetallic nodules: Availability on the open market, future design and development". The topic was discussed by Mr. Akihiro Masuda, General Manager of the Department of Technical Development, of the Metal Mining Agency of Japan, and by Mr. Axel Bath, a Marine Engineer from Preussag AG, Federal Republic of Germany.

9. The seminar continued on Friday, 19 August 1988, and considered two subject areas. The first was "Processing technology: Availability on the open market, future design and development", and was covered by Mr. Bruce McKean, economist with the Ministry of Energy, Mines and Resources of Canada, and Mr. Luis Preval, Principal Specialist with the Ministry of Basic Industry of Cuba. The second topic was "Perspectives for commercial exploitation of polymetallic nodules: Availability of technology, economic feasibility", and was dealt with by Mr. Jan Magne Markussen, Project Director, Ocean Mining, Fridtjof Nansen Institute, Norway. Owing to a shortage of time it was necessary to complete the seminar on Monday, 22 August 1988, with the final topic, "Mechanisms for transfer of technology", on which Mr. Pedro Roffe, Senior Legal Officer of UNCTAD, made a presentation.

10. Besides the experts listed above, the seminar was also addressed by the other experts, namely, Mr. Alfredo da Silva Netto (Brazil), Mr. H. H. E. Kambaila (Zambia) and Mr. T. R. P. Singh (India) as well as other members of the Special Commission. Press Release No. SEA/973 of 29 August 1988 contains an extensive summary of the proceedings of the seminar.

III. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

11. At its 81st meeting, the Special Commission embarked on its first full consideration of document LOS/PCN/SCN.3/WP.6/Add.4. The co-sponsors of the amendments contained in document LOS/PCN/SCN.3/WP.13/Rev.1 pointed out that although the document was not technically a revision of WP.13 which they had introduced at Kingston during the spring session, it represented an effort to provide a more comprehensive set of amendments to WP.6/Add.4. They pointed out that they were in agreement with some of the contents of WP.6/Add.4, expecially paragraph 2 of its explanatory note. In particular, they agreed that the obligation of the contractor was a last-resort obligation; that the obligation ceased after the tenth year of commercial production by the Enterprise; and that if the obligation was invoked the resulting sale of technology by the contractor was to be at a fair and reasonable price. They went on to state that the proposals contained in WP.13/Rev.1 were meant to elaborate a framework that would work and that would assure that the Enterprise would obtain the required technology at a fair and reasonable commercial basis.

12. On the other hand, it was pointed out by other delegations that some of the proposed amendments in WP.13/Rev.1 were not in accordance with the provisions of the Convention in general and those of annex III, article 5, in particular. They recalled that the Convention was a compromise reached after many years of negotiations and that it should be the Special Commission's objective to work on the basis of the Convention.

Article-by-article examination: Part VII. Transfer of Technology

Article 90. Scope of these regulations

13. In the article-by-article examination of the documents, it was pointed out that the issue of joint ventures with the Enterprise should be included in this article. It was also pointed out that article 97 (3) of WP.6/Add.4 on joint ventures refers to article 95 (Undertakings in contracts with respect to transfer of technology for the benefit of developing States) and that experience from land-based mining indicated that close co-operation was required between the parties involved in a mining venture. Therefore, the possibility of any two parties to freely enter into a contract on a normal commercial basis the terms and conditions of which should be a matter for negotiation as provided for in annex IV, paragraph 6 (g), is consequently realized under the proposed amendment contained in article 90 (3) of WP.13/Rev.1. On the other hand, it was suggested that although the issue of joint ventures should not be dealt with in article 97 of WP.6/Add.4 as it is presently worded, it also should also not be a part of article 90 but should be the subject of a totally separate article.

14. The view was expressed that if under the provisions of article 90 (2) of WP.13/Rev.1 the obligation would be invoked only in the tenth year, the actual transfer of the technology might not take place and it was therefore suggested that the words "given effect" in the amendment to the article should be deleted since it was pointed out that the 10 year period was relevant only for the invocation of the undertakings. According to another view, 10 years after the commencement of commercial production by the Enterprise was a sufficient period for the Enterprise to have acquired all the technology it needed, and although article 90 (2) did not preclude the implementation of the obligation to the transfer of technology after the lapse of 10 years, it was important for the contractor to know the expiration date of his obligations.

15. It was pointed out that processing technology could not be included under the transfer of technology since annex III, article 5 (8) contained no reference to processing and annex IV, article 1, could not be interpreted as an obligation to transfer technology, since the obligation under that article was limited to activities in the Area only, and no processing was intended to be carried out in the Area. On the other hand, it was suggested that the scope of article 90 convered processing also as provided for in annex III, article 5, and that the exclusion of processing would be adverse to the interest of the Enterprise. Processing was required to create a viable mining system since all activities related to exploration and exploitation must be integrated.

Article 91. Use of terms

16. It was observed that the definition in WP.6/Add.4 was taken directly from the Convention, unlike the definition in WP.13/Rev.1. Another view was that the definition of "technology" was very complex and the proposal in WP.13/Rev.1 attempted to draw a distinction between the technology itself and the process of its transfer since conceptually only the process of transfer could have a legal basis while the technology had a more objective basis. It was pointed out that

there was a difference between a contractor who was an exclusive user of technology but did not have the right to transfer it and a contractor who was both an exclusive user and an owner of the technology and was therefore obligated to transfer.

17. It was suggested by the co-sponsors of WP.13/Rev.1 that article 91 (bis) (General provision of information) and article 91 (ter) (Assistance to be provided) were intended to fill a gap that existed in WP.6/Add.4 since those articles simplified the procedure by providing the correct method as to how the required information could be submitted and clarified all the steps the Enterprise needed to follow. Another view was that the articles might alter the nature of the contractor's obligation since the term "similar" was different from the term "same" when describing technology. It was further suggested that a more suitable term could be "appropriate" or "comparable" and that the term "inform" should not be changed to "indicate". Another suggestion was that the use of the term "plan of work" instead of "activities" and "components thereof" might result in reducing the obligations of the contractor.

Article 92. Undertakings in contracts on transfer of technology which the contractor is legally entitled to transfer

18. The amendment contained in article 92 of WP.13/Rev.1 proposes to combine the provisions of articles 92 and 93 of WP.6/Add.4. It was suggested that the amendment in WP.13/Rev.1 is a comprehensive article containing the essence of the contractor's obligations since these obligations can only be discharged through the conduct of good-faith negotiations. It was imperative that negotiations must be carried out in good faith as this was the starting point for the establishment of fair and reasonable terms and conditions as well as the market price. The amendment was intended to find the means of developing workable rules and regulations to secure the effective operation of the Enterprise and contractors on a commercial basis. It was also pointed out that, although the transfer of technology must take place through negotiations, annex III, article 5 (3) (b), does not require the functioning of normal market mechanisms.

19. On the other hand it was pointed out that the proposal contained in article 92 of WP.13/Rev.1 seriously detracted from the relevant provisions of the articles of annex III to the Convention, which clearly and explicitly describe the nature of the undertakings to be included in every contract for carrying out activities in the Area. It was also suggested that the amendment introduced concepts not derived from the Convention and there was no basis to argue that the Convention would inhibit the development of technology.

Article 93. Undertakings in contracts on transfer of technology which the contractor is not legally entitled to transfer

20. It was suggested that a written assurance from the owner of the technology cannot create an obligation since such an assurance would lack the basic elements of a legal obligation and could only be considered a moral obligation. What was required was the existence of mutual trust since the transfer of technology could not be regarded only as a mechanical act but must be an ongoing process with continuous co-operation of the partners involved. It was pointed out that

article 93 (2) of WP.6/Add.4 created an excessive and unreasonable penalty that punished the contractor even if he had made every effort to acquire the technology but because of circumstances beyond his control he was unable to do so.

21. On the other hand, it was suggested that the issue of unfairness to the contractor was not valid. A contractor who genuinely wanted to transfer the technology would get the assurance from the owner of the technology in the form of an enforceable contract. This would be possible if the contractor entered into negotitions with the owner of the technology resulting in the creation of the undertaking by the owner to supply the technology to the Enterprise. This arrangement would protect the interests of both the Enterprise and the contractor. It was pointed out that if the Enterprise depended on good faith only it would be possible that in the case of a dispute arising between the Enterprise and the contractor a very long time might be required to settle the issue if no legal obligations existed. It was further pointed out that there was no basis for contending that the written assurance required by article 5 (3) (b) of annex III to the Convention had no legal validity.

Article 94. Procedure for obtaining technology

22. It was suggested that the amendment contained in articles 94 and 95 of WP.13/Rev.1 introduced the concept of "open tender" in normal business practice. The amendments intended to clarify and develop the provisions of article 94 of WP.6/Add.4 so that in circumstances where the Enterprise could not obtain the necessary technology, it could request the contractor to assist. It was further pointed out that, if it was necessary to impose obligations on contractors as regards assurances, then there would have to be a balancing obligation on the Enterprise that it has taken all necessary measures. The amendment in WP.13/Rev.1 provides an "agreement on procurement" by which procedures under the agreement would work in a timely fashion, discourage discriminatory practice and enable the Enterprise to set aside a system of competitive tenders.

23. Another view was that there was no need for the Council to invoke the undertakings and that since the invocation was considered an administrative matter the Secretary-General of the Authority could invoke the undertakings. It was also suggested that the procedures contained in article 95 of WP.13/Rev.1 would create an even more complicated situation since that amendment would require that the Enterprise undertake a market survey, publish a notice of needs in international papers, open tender invitations, request assistance from the contractor and report to the Governing Board that it was unable to obtain technology. In this situation the Governing Board would request the Council to invoke the undertakings. The Council would then request the Legal and Technical Commission to make a recommendation and finally the Secretary-General would be requested to ask the contractor to honour the undertakings. It was suggested that such a procedure could easily frustrate the functioning of the Enterprise.

24. The views were expressed that some of the issues raised under the article could be relevant to the discussions in Special Commission 2.

IV. CONCLUSIONS

25. Members of Special Commission 3 had a unique opportunity to inform themselves on a first-hand basis about the technical and commercial possibilities and perspectives for deep sea-bed mining of manganese nodules. It was the first time since the adoption of the Convention that highly qualified experts had addresed the Commission in the framework of a seminar in which all delegations represented at the current summer meeting could participate. The seminar showed that, although commercial mining projects are of an extremely technically complicated and financially risky nature, they are likely to become operative before the end of the present century. This will undoubtedly be a factor which Special Commission 3 will have to take into account when organizing its future work.

26. As regards the continued consideration of the draft articles on the transfer of technology as contained in document WP.6/Add.4, the Special Commission has made such progress that I suggest that it devote the whole of the spring session in 1989 at Kingston to this working paper with a view to terminating its full first reading. If such were the case the Special Commission at the summer meeting in 1989 could begin the first reading of any remaining working papers before it, such as document WP.6/Add.1 containing draft articles on production authorization or any other working paper that the Secretariat will have issued well in advance of the summer meeting.

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Seventh session
Kingston, 27 February-23 March 1989

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION.

I. ORGANIZATION OF WORK

1. During the 1989 spring session of the Preparatory Commission, Special Commission 3 held 10 meetings, i.e. the 88th to 97th meetings. It should be recalled that during the summer meeting last year of the Preparatory Commission in New York, Special Commission 3 had embarked on an article by article examination of document LOS/PCN/SCN.3/WP.6/Add.4, Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, specifically dealing with draft regulations on the transfer of technology until ten years after commencement of commercial production by the Enterprise.

2. The Special Commission began its work at this session by continuing the article by article examination, commencing with article 95, and proceeded to conclude the full first reading of the document. While doing this, it also considered amendments contained in document LOS/PCN/SCN.3/WP.13/Rev.1, submitted last year and in document LOS/PCN/SCN.3/WP.14, submitted during this session by the Group of 77. After finishing the first reading, of the document, it was necessary to revert to article 90 in order to allow for an examination of the amendments contained in document LOS/PCN/SCN.3/WP.14 to articles 90 to 94 which had not been considered during the earlier article-by-article consideration of those articles.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

3. Following the introduction of document LOS.PCN/SCN.3/WP.14, the Special Commission resumed the article-by-article examination with article 95.

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Article 95. Undertakings in contracts with respect to transfer of technology for the benefit of developing States

4. The absence of reference in the amendment contained in WP.13/Rev.1 to the issue of transfer of technology to developing countries was queried. The view was expressed that there was a danger of the technology transferred falling into the hands of a competitor, and therefore it was necessary to provide adequate safeguards against that occurring. It was also pointed out that provisions for confidentiality must be formulated and clear criteria established to cover constitutional and contractual requirements.

5. It was pointed out that there was a need for joint ventures between the Enterprise and developing countries so as to ensure that developing countries could acquire the necessary technology. The existence of such joint ventures would not require the transfer of technology to developing States. The provisions of the Convention did not clearly stipulate that there was an obligation to transfer technology to developing countries, and there was no need to include provisions in the mining code to require the transfer of technology from developed to developing States. Such arrangements did not belong in the mining code, and should only be the subject of bilateral agreements.

6. However, another view expressed was that the Convention envisaged the transfer of technology to developing States and that such a provision must not be omitted from the mining code. It was further stated that a restrictive interpretation denying the transfer of technology to developing States could not be accepted and that it was important to take into account what was happening in reality in regard to day-to-day transactions on the transfer of technology. It was also pointed out that the United Nations Convention on the Law of the Sea referred to the status of developing countries as potential recipients of technology and there was a need to establish the eligibility of persons sponsored by developing States to have technology transferred to them.

7. Another view expressed was that there was doubt whether the Convention requires the obligatory transfer of technology to developing States if they are a partner in a joint venture with the Enterprise. It was felt that in this case, the obligation to transfer would be limited only to the Enterprise and not to the other partner. Consequently, it was stated, there appeared to be a contradiction between the provisions of this article and those of Annex III, article 5. On the other hand, it was pointed out that there was no such contradiction, since those provisions related to different aspects and therefore both the Enterprise and developing States would be eligible for the transfer of technology.

8. A question was raised whether it was possible to create a tripartite joint venture comprised of developed and developing countries with the Enterprise and whether such a joint venture could operate in the whole area or only in a part of it. It was pointed out that there was no proper legal basis for limiting joint ventures to those between the Enterprise and

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developing States. Another question raised was whether a contractor could, in addition to developing his own site, enter into a joint venture with the Enterprise to develop a reserved area.

Article 96. Procedures for obtaining technology by developing States

9. It was pointed out that the amendment contained in WP.14 sought to establish a procedure for developing States to obtain technology similar to the procedure applicable to the Enterprise. As a result, there existed a connection between these procedures and they should be considered together. Another view expressed was that there was no common basis regarding the procedures for obtaining technology. It was felt that an effort had to be made to obtain the required technology on the open market before invoking the undertaking for the mandatory transfer of technology. It was also pointed out that it was important to divide the procedures involved into separate categories.

10. It was pointed out that there was a need for an article on training, such as article 96(ter) contained in WP.14, to be included in any provisions dealing with the transfer of technology since this was part of the obligation of the contractor and was consistent with the requirements that the contractor would have to fulfil in respect to his plan of work.

Article 97. Limitations on undertakings

11. It was pointed out that the only limitation to the transfer of technology should be the ten-year period following the onset of commercial production by the Enterprise. Any other limitation would be contrary to the provisions of the Convention and to require that undertakings be invoked only during the ten-year period would be even more limiting. Furthermore, it was stated that the provisions of paragraphs 1 and 2 of this article were unnecessary since article 302 of the Convention, which covered any concerns about national security, applied to all types of information. It was felt that any use of article 302 in a selective manner would be wrong. What was required was a written assurance from the contractor to provide specific technology; if no assurance was obtained, the technology involved should not be used in the Area. It was also felt that the inclusion of references to a State's security considerations in regard to the transfer of technology was overly selective.

12. Concern was expressed that national security considerations could be used by industrialized States as a loophole to avoid fulfilling their obligations to transfer technology. It was pointed out that adequate safeguards could be included in the contract without creating obstacles to such transfer. Another view was that there was need for contractors to certify when submitting their applications that the transfer of certain technology would have national security implications and that there must be mechanisms to verify such certification. The provision that a contractor could decline to transfer technology to the Enterprise because it already had access to similar technology should be deleted. It was important to note that similar technology might have different levels of efficiency or that the Enterprise might need additional components of technology it already possessed. It was also pointed out that there were no grounds for the assumption that the Enterprise would seek technology that was inappropriate to its needs.

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13. On the other hand, it was stated that article 302 of the Convention did warrant the inclusion of a provision permitting limitations on undertakings on the basis of national security and that the existence of such a provision was considered a sine qua non. Furthermore, this view favoured the inclusion of a clause for protecting national security interests which, it was said, should be a pre-condition of any transfer of technology. It was pointed out that national security concerns were a logical exception to the transfer of technology and in reality were only utilized as a last resort. It was also pointed out that owners of technology were all too eager to find potential buyers and would probably attempt to convince their governments not to issue certificates preventing the transfer of technology solely on the basis of national security.

14. Another view expressed was that if there were any concerns regarding the certificate to be issued, there should be the possibility of using an equitable dispute settlement procedure, but that it was unrealistic to expect a State to explain in detail all its national security considerations. It was also pointed out that it was important to guarantee the proper functioning of the parallel system and to prevent any abuse of the undertakings by the contractor.

15. It was pointed out that the amendments contained in article 98 of WP.13/Rev.1 set out speedy and flexible dispute settlement procedures which would ensure that the parallel system operated effectively. Furthermore, those cases in which contractors had declined to transfer technology could be reviewed by a panel of experts, and such an informal procedure could prove quite effective. It was also pointed out that the use of such a panel of experts was in fact a form of conciliation to help parties reach quick agreement rather than resort to a formal dispute settlement mechanism. On the other hand, it was stated that the panel of experts could be seen as an unnecessary imposition and that it was preferrable to utilize existing dispute settlement procedures set out in the Convention.

16. As regards what constituted "fair and reasonable commercial terms and conditions" it was argued that this concept was very difficult to define, and was restrictive and unnecessary. It was recalled that the Third United Nations Conference on the Law of the Sea had failed to reach agreement on what was meant by "fair and reasonable". It was better that negotiations be conducted in good faith and that any settlement must be decided on actual facts of the actual case. The view was expressed that it would be best not to attempt to define "fair and reasonable commercial terms and conditions" because market and technology development were in constant flux and there should be no need to prejudge the issue. It would be better not to try to specify these conditions and they should be left to evolve within the framework of the contract.

17. On the other hand, it was pointed out that many arguments in support of clarifying what were "fair and reasonable commercial terms and conditions" had been expressed at previous sessions of Special Commission 3. It was important, however, to reiterate that where no precise norm was included in the contract, it would be advisable to try to give some general interpretative criteria such as this concept.

Article 98. Notification of revisions; Article 99. Disputes concerning a contractor's undertakings; Article 100. Disputes concerning other undertakings required by these regulations; and Article 101. Consultation by a group of States Parties

18. The discussion on these articles was somewhat limited and tended to cover the same ground already considered. Many of the issues raised can be found in previous statements to Plenary by the Chairman of Special Commission 3, and I feel there is no need to repeat those arguments here.

19. After completing the first reading of all the articles in this document, the Special Commission reverted to article 90 to examine the amendments contained in WP.14 that had not been considered during the first reading. It was pointed out that one of those amendments recommended that the title of the document be shortened by deleting the reference to the ten years after commencement of commercial production by the Enterprise.

Article 90. Scope of these regulations.

20. Another amendment in WP.14 suggested that processing be included in the scope of this part. It was pointed out that it would be difficult to conceive of an integrated operation to be carried out by the Enterprise which would exclude processing. It was further pointed out that the Convention did raise the issue of at-sea processing, and that the Convention was sufficiently ambiguous, since under the financial terms of the contract, processing plant costs could be recovered from proceeds that would otherwise go to the Authority. It was difficult to understand why the transfer of technology would be limited only to the recovery of polymetallic nodules, while the Enterprise was in fact going to be involved in processing.

21. On the other hand, it was stated there was no basis for including processing under this part dealing with the transfer of technology. It was pointed out that such transfer was limited to activities in the Area and that since processing would not normally be carried out in the Area, it should not be included. Another view expressed was that the Convention does not make the transfer of processing technology mandatory. However, should processing occur in the area and within the ten-year period of commencement of commercial production by the Enterprise, then the transfer of technology would also apply to processing.

Article 91. Use of terms

22. It was stated that the term "viable system" relates to the activities referred to in Annex III, article 5, paragraph 5 of the Convention; it therefore would include processing, and should not be subject to narrow interpretations. Another view expressed was that a "viable system" would include usable technology and that a contractor would not be required to transfer unproven technology or prototypes. It was also pointed out that it was possible to have a contract covering exploration or exploitation only, and to have a viable prospecting system only.

23. As regards the amendments contained in article 91(bis) of WP.14, it was pointed out that there was no sufficient ground in the Convention for the

extension of the ten-year period. It was felt that this period was substantial enough and that the Enterprise would be independent thereafter.

24. With reference to the amendment in article 91(ter) of WP.14, the view was expressed that it presented no basic difficulties, but was not necessary since it might result in changing the wording of the Convention.

Article 92. Undertakings in contracts on transfer of technology which the contractor is legally entitled to transfer

25. It was pointed out that the amendment to this article contained in WP.14 reproduces the provisions in a statutory form and is intended to make the procedures contained in the Convention as expeditious as possible; therefore, the term "Authority" should be deemed to refer to the Secretary-General. On the other hand, it was stated that the omission of the phrase "every contract shall" in the amendment and the designation of the Secretary-General to invoke the undertakings were not acceptable. It was felt that this was a descretionary power and could not be given to the Secretary-General.

26. As regards the amendment in article 92 of WP.13/Rev. 1, the view was expressed that its provisions subverted the contents of Annex III, article 5 of the Convention by reducing the obligation to a mere undertaking to enter into good faith negotiations. On the other hand, it was pointed out that that amendment was not intended to subvert the Convention, but there was no other way to attain fair and reasonable commercial terms and conditions. other than on the basis of good faith negotiations. It was felt that any mandatory transfer of technology could not be considered as fair.

Article 93. Undertakings in contracts on transfer of technology which the contractor is not legally entitled to transfer

27. It was suggested that the term "owner" be clarified by specifying some types of owners of technologies. It was also proposed by the same group of delegations that the written assurance from the owner to transfer technology be submitted by the applicant to the Authority along with the application for approval of the plan of work. It was emphasized that this assurance must be legally binding and enforceable. The plan of work must contain the type of technology which is going to be used and it was felt that it would be possible for the applicant to obtain the assurance from the owner at that time.

28. On the other hand, it was emphasized that it was inappropriate to include such a wide range of entities in the definition of "owner" as not all of them would possess the legal right to transfer technology. It was further pointed out that "owner" is a well developed legal concept, and therefore need not be defined in such detail. Some reservations were expressed with regard to making the assurance legally binding, since it would be an obligation the terms of which were not specified. The view was expressed that the written assurance would be a disincentive for the contractor in that he would have to deal with many suppliers of technology some of which might not even be known; some of the owners might be unwilling or unable to transfer the rights to the technology, and if many owners of sub systems existed the contractor would

have to obtain assurances from each one. As for the time of submission of the written assurance, it was felt that it was unrealistic to submit it at the same time as the application because the applicant might not know exactly what type of technology he would be using in the future and would not as yet have purchased it. That would apply particularly in the case of an applicant for approval of a plan of work for exploration and exploitation.

29. It was emphasized that the penalty imposed on the applicant prohibiting the use of the technology for which no written assurances were submitted was excessive. The contractor, acting in good faith, should not be punished for something which was beyond his control. It was suggested that additional illustrations of exceptional circumstances might be useful in future discussions.

Article 94. Procedure for obtaining technology

30. Some delegations proposed that the Secretary-General of the Authority should be empowered to invoke the undertakings since this was considered to be an administrative matter. Giving such discretionary power to the Secretary-General would simplify the procedures and ensure the timely and effective operation of the Enterprise. If such a responsibility was given to the Council, the procedure would become too time consuming and cumbersome and the Enterprise would be subject to a political body which could interfere with the sound commercial principles upon which the Enterprise would operate. The Enterprise must be guided by market principles and have sufficient autonomy to carry out its tasks.

31. Another view expressed was that the mandatory transfer of technology should not become an automatic transfer and that the Enterprise shall be subject to the directives and control of the Council in accordance with article 170 of the Convention.

32. It was considered essential that the decision to invoke the undertakings be considered by a technical body such as the Legal and Technical Commission. There was no justification for such discretionary powers being given to the Secretary-General of the Authority. It was stated that procedures for the enterprise must be transparent and orderly and provide assurances for the operators and for those funding the Enterprise. In that connection, there was a need for reference to open tendering and single tendering which should be based on performance rather than design.

33. The view was expressed that some of the issues raised under the article could be relevant to the discussions in Special Commission 2. Another view expressed was that some of the amendments presented were contrary to the spirit and letter of the Convention and would ultimately defeat the regime contained in it. On the other hand, it was stated that these amendments were intended to fill the gaps and the omissions in the Convention, and not to violate the Convention.

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CONCLUSIONS AND FUTURE PROGRAMME OF WORK

34. Special Commission 3 was successful in completing the full first reading of the draft article on the transfer of technology contained in document LOS/PCN/SCN.3/WP.6/Add.4. In making this concerted effort, it has reached the goal it had set itself at the end of the sixth session (see document LOS/PCN/L.64, paragraph 26).

35. As stated in that same paragraph, the Special Commission will next have to begin a first reading of document LOS/PCN/SCN.3/WP.6/Add.1 containing draft regulations on production authorizations. Although the Special Commission might have wished to consider another document first, it has no alternative since no other draft regulations will be ready in advance of the summer session.

36. As requested by the Chairman of the Preparatory Commission, I have submitted to the Secretariat a paper suggesting a future programme of work for Special Commission 3 and including those items on which regulations need to be drafted. This paper has been issued as LOS/PCN/SCN.3/1989/CRP.8, and was introduced at the Special Commission's 97th meeting. The time-table is designed to cover a period between now and the time when the Convention may be expected to enter into force.

37. In view of the expected workload for Special Commission 3, I called a meeting of the Bureau and requested the Vice-Chairmen (from Gabon, Mexico, Pakistan and Poland) to assist me whenever I might not be in a position to chair the meetings due to conflicting duties. I have been assured of the co-operation of the Bureau in this respect.

38. It may well be that the request for the number of meetings as indicated may not be fulfilled under the existing practice of distributing meeting time between the Plenary and the four Special Commissions. In that case, the Preparatory Commission will have to indicate what priority should be set. In this respect, I am pleased to note that I have been assured by delegations from all regional groups ever since I took office in March 1986 that the drafting of the deep sea-bed mining code is the heart of the matter. I am confident that the Special Commission is clearly willing to accomplish a first reading of all draft articles of the future mining code before time runs out for the Preparatory Commission.

39. It should not be too difficult for the Special Commissions to decide on priorities. Given the costly and time-consuming operation which the Preparatory Commission represents both for the United Nations and for individual Member States, I am sure that Special Commission 3 will be accommodated, especially by those groups in the Preparatory Commission which have already considered a variety of texts in two or more readings. Such accommodation would be particularly appropriate in view of the fact that many States around the world are waiting for the results of the Preparatory Commission in order for them to decide upon becoming parties to the United Nations Convention on the Law of the Sea.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
New York, 14 August-1 September 1989

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1989 summer session of the Preparatory Commission, Special Commission 3 held nine meetings, i.e., the 98th to 106th meetings.

2. Following the usual practice of the Contact Group of the Group of 77 on Special Commission 3 matters, the Group utilized for co-ordination purposes some of the time allocated for meetings of Special Commission 3.

3. It will be recalled that at the spring session at Kingston, Special Commission 3 successfully completed the full first reading of the draft articles on the transfer of technology (LOS/PCN/SCN.3/WP.6/Add.4). In making this concerted effort, it has reached the goal it set for itself at the end of the sixth session (see LOS/PCN/L.64, para. 26).

4. At the same spring session at Kingston, as requested by the Chairman of the Preparatory Commission, I had submitted a paper (LOS/PCN/SCN.3/1989/CRP.8) suggesting a future programme of work for Special Commission 3 and including those items on which regulations needed to be drafted. The timetable was designed to cover a period up to the time when the Convention may be expected to enter into force.

II. SEMINAR ON THE PRODUCTION POLICY AS SET OUT IN THE CONVENTION

5. The seminar was devoted to a discussion of issues relating to the production policies with regard to the resources of the international sea-bed Area such as the concerns of producers, consumers and potential sea-bed miners which arose during the negotiations in the Third United Nations Conference on the Law of the Sea that led to the formulation of the production ceiling, the intent of the production

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ceiling, "floor" and safeguard provisions and their duration, the mathematics involved in their determination as well as the implications of the production ceiling/production authorization provisions under the current mineral situation. Speakers included experts in various fields related to the subject-matter from the Federal Republic of Germany, Canada and the Secretariat of the United Nations. The experts made their presentations in their personal capacities on the basis of their expertise; the views they expressed did not necessarily reflect those of their Governments.

6. The seminar was intended to assist the work of Special Commission 3, which has the responsibility to draft the rules and regulations regarding production authorizations. I am of the opinion - and I am sure that this opinion is shared by many delegations who attended the seminar - that it proved a very useful tool in providing valuable information on the issue of the production policies with regard to the resources of the international sea-bed Area.

7. The seminar commenced on the morning of 15 August 1989 with the topic entitled "The 'floor', ceiling and safeguard clauses of the production policy with an illustration if earliest commercial production is in 1993", which was presented by Mr. Bruce McKean of the Ministry of Energy, Mines and Resources of Canada. The second topic was "The mathematics involved in the determination of the ceiling, 'floor' and safeguard clauses in the production policy", which was presented by Professor Dr. Klaus Brockhoff of the University of Kiel, Federal Republic of Germany.

8. The seminar continued on 17 August and considered two subject areas. The first was an overview of the production ceiling, including an examination and explanation of provisions of the Convention dealing with the salient features of the operation of the production authorization system; the subject was discussed by Mr. Mati Pal of the United Nations Secretariat. The second topic concerned current market conditions in the light of the production ceiling provisions and market projections, and was presented by Mr. Lance Antrim, a consultant to the United Nations Secretariat.

III. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

9. At its 99th meeting, on 17 August, the Special Commission embarked on its preliminary first reading of document LOS/PCN/SCN.3/WP.6/Add.1 containing draft regulations on production authorizations. The working paper was introduced by the Special Representative of the Secretary-General for Ocean Affairs and the Law of the Sea, Mr. Satya Nandan, who said that the paper had been prepared, taking into account the principles contained in article 150 (policies relating to activities in the Area) of the Convention and the impact of large volumes of metals on the metal market at a given moment. To integrate this new source, he stated, the interim period as defined in article 2 of the working paper was introduced. He elaborated upon the two-step procedure in the production authorization system: in the first step the applicant submitted a plan of work to the Authority for approval; in the second step an operator with an approved plan of work applied to the Authority for production authorization up to five years before the date of planned commencement of commercial production.

10. Mr. Nandan went on to state, inter alia, that the formula was based on nickel because it was considered less volatile; that the formula had been computed using historical nickel consumption figures as the best way of looking at the future; and that the choice of the previous 15 years' nickel consumption figures was a compromise between the use of a "long" period, which might not be as sensitive to the developments in the recent past and a "short" period which might be dominated by short-term fluctuations.

11. The production control formula as provided for in the Convention recognized an initial five-year period during which 100 per cent of all nickel demand growth is open to sea-bed miners (buildup period). After the fifth year, new sea-bed mining operations would be able to compete for up to 60 per cent of the growth. However, concerns were expressed that if the actual rate of growth of nickel demand in the future happened to be rather low, the maximum allowable production from the sea-bed as determined above may be too restrictive for the development of the nascent sea-bed industry. It was therefore decided to calculate the maximum allowable sea-bed production with the use of a notional growth rate of future nickel demand, specified at 3 per cent, if the actual growth rate in the future turned out to be lower than 3 per cent. This minimum below which the maximum allowable sea-bed production would not fall is referred to as the "floor".

12. Given concerns that, under very low actual growth rates in future, the "floor" may be greater than the actual growth segment itself, a mechanism was incorporated which ensured that sea-bed production would not be allowed to exceed 100 per cent of the growth segment as calculated under the original provisions. This is referred to as a "cap" to the "floor" provision. Mr. Nandan noted in conclusion that, given the persistent low growth in the nickel market in recent years, the "cap" provision had distorted the "floor" provision. He stated that this occurrence may necessitate a re-examination of the "cap" provisions. Following this introduction, Special Commission 3 commenced a general exchange of views on the working paper.

13. Several statements were made in the course of the general exchange of views, one of which was that the production policies as contained in the Convention were among the serious obstacles to acceptance of the Convention by a number of States. For this reason they had abstained from participation in detailed debate. Some delegations argued that the general protective effect of the provisions contained in article 151, paragraphs 2-7, and 9 of the Law of the Sea Convention favoured all land-based producers regardless of whether they operated in developed or developing countries and regardless of whether they deserved protection, and that it might lead to the preservation of production structures which might no longer be economically viable and which were detrimental to consumers. It was further stated that the trend line values for nickel consumption during the last 15 years prior to the year in which a production authorization was granted was merely a prolongation of past trends into the future and left aside all factors and developments which might affect consumption in the future.

14. Others expressed concern about the consequences of subsidized sea-bed production for the economies of producers and consumers of nickel, copper, cobalt and, perhaps, manganese. It was suggested that Special Commission 3 should draw up

rules and regulations to bring some discipline to the ability of Governments to subsidize production from the deep sea-bed. It was also noted that a draft recommendation, seeking "approval in principle" of measures to restrict the likelihood of deep sea-bed production being subsidized, had been introduced in Special Commission 1.

15. It was stated that the production control formula had been conceived and developed in order to control unrestricted production from the deep sea-bed. It was pointed out that the Governments that had accepted the formula did so not to prevent structural adjustment but to ensure that sea-bed mining occurred in a measured way, and in a way calculated to phase in a major new source of important industrial raw materials.

16. Lastly, it was pointed out that each production authorization represented at least 38,000 tons of nickel for an expected 20-year life of a mine or about 4 per cent of total annual world production of nickel from sulphide and lateritic ores.

17. Some delegations pointed out that the limitation-of-production provision of the Convention was intended to minimize the detrimental effects that an increased supply of minerals resulting from deep sea-bed mining could have not only on both land- and sea-based producers, but also on consumers world wide. This and other related provisions of the Convention were also designed to protect land-based producers, especially the developing land-based producers, from the adverse effects that such an increased supply would inflict on their economies, thus ensuring a smooth transition from a purely land-based supply of minerals to one that relied on both land and deep sea-bed reserves. It was also stressed that such a mechanism as in the case of other provisions of Part XI, was confined to a specific time frame, which in this case corresponded to the interim period, during which it was assumed that the negative effects of the new supply of minerals would gradually dissipate.

18. As to the production limitation formula itself as contained in article 151, it was pointed out that it was devised by technical experts who had used sound reasoning in its formulation and that the mathematical and statistical methods used in it were standard practice in the business world for similar or analogous purposes. The point was also made that several elements of the formula took into account important market considerations as well as the viable entry level of sea-bed production.

19. The same delegations also stressed that, as was the case with many other provisions of the Convention, articles 150 and 151, embodying the Convention's resource policies, were the result of a delicate compromise between the diverging interests of all States involved in its negotiation. The provisions of those articles therefore reflected the balance that had been struck on the matter, and which should not be upset.

Article 45. Production authorization for commercial production

20. In an article-by-article examination of the draft regulations (LOS/PCN/SCN.3/SP.6/Add.1), it was pointed out that article 45 thereof referred to the applicant while article 151 (2) (a) of the Convention spoke of the operator and

not an applicant. It was suggested that perhaps article 45 of the draft regulations should refer to either a contractor or an operator.

Article 47. Time of submission of applications for production authorizations

21. It was argued that, whereas article 151 (2) (a) of the Convention assigned the responsibility of prescribing a period greater than five years prior to the planned commencement of commercial production by an operator to the Authority, article 47 of the draft regulations assigned the function to the Legal and Technical Commission. It was stated that since this responsibility was one assigned to the Authority by article 151 of the Convention, article 47 of the draft regulations should be brought into line. On the other hand, it was pointed out that article 165 (n) of the Convention entrusted the Legal and Technical Commission with the task of issuing production authorizations on behalf of the Authority.

22. It was also stated that the five-year period as specified in article 151 (2) (a) of the Convention as well as the extension of the time-limit had been introduced because of the technological and organizational uncertainties faced by an industry which will come into existence in the future. It was suggested that if current information provides greater certainty, these time periods should be changed.

23. A proposal was submitted to redraft article 47 of the draft regulations. The proposal sought to address the major problems that would face the sea-bed miner once technology has been developed to the point that it can be used for mining; they were identified as relating the actual levels of metal prices at the time of commencing production and price stability aspects at these levels in metal markets.

Article 55. Production ceiling

24. It was pointed out that the article reproduced the key provision of the Convention with regard to the limitation of production and that as such it constituted the central element of the rules and regulations on production authorizations. Another view was that the provisions of the article required a special approach. Since prospects for sea-bed mining were receding, rigid formulas as contained in the article should be examined carefully. It was also suggested that the Secretariat should conduct further studies to analyse the problems created by the provisions of the article to design a formula that was more flexible, thereby enabling more contractors to engage in deep-sea mining.

25. A contrary view was that sea-bed miners benefited from the provisions of the article. It was argued that even under the current conditions of low growth large tonnages of nickel would be produced under the production control formula. It was also stated that since the production control formula was an interim measure for an interim period, it would permit structural adjustment and remove rigidities in the world mineral market.

26. Some delegations said that document LOS/PCN/SCN.3/1989/CRP.9 (Production authorizations: Explanatory note prepared by the Secretariat) was useful as an explanatory note, inasmuch as it contained a review of the circumstances that led

to the adoption of the production limitation formula as well as calculations on production ceilings using current data on nickel consumption. Several delegations suggested that the conclusions contained in the document might be useful in the search for solutions to the problems caused by the production control formula. Certain delegations stated, however, that they could not accept the conclusions drawn in paragraphs 65 and 66 of that document, for in their view a revision in the production limitation formula was not warranted. It was also pointed out that LOS/PCN/SCN.3/WP.6/Add.1 constituted the basis for the discussions on production authorizations in the Special Commission.

Article 57. Consideration of applications by the Legal and Technical Commission

27. It was proposed that another paragraph be added to the article, requiring the Secretary-General of the Authority to inform all members of the Authority of details of the issuance of a production authoriztion.

IV. CONCLUSIONS AND FUTURE WORK PROGRAMME

28. During the current summer session Special Commission 3 has made good progress in its work by completing a preliminary first reading of LOS/PCN/SCN.3/WP.6/Add.1 containing draft regulations on production authorizations. In doing so the Special Commission has fulfilled the goal it set itself at the beginning of the summer session. The preliminary first reading of the draft regulations has enabled delegations to identify the positions of members of the Special Commission on the issue of a production policy in general and the instrument-of-production limitation by means of a production ceiling as contained in article 151 of the Convention in particular.

29. The seminar with which Special Commission 3 began its debate at the session has in my opinion facilitated the exchange of views in the consideration of LOS/PCN/SCN.3/WP.6/Add.1.

30. As I have indicated in the future work programme of Special Commission 3 which I submitted to the Commission (LOS/PCN/SCN.3/1989/CRP.8) and which will form the basis of our work at the sessions to come, the Special Commission will continue its consideration of LOS/PCN/SCN/WP.6/Add.1 at the spring session of 1990 at Kingston. Basing myself on the experience at this summer session I have the impression that the Special Commission will be able to hold and conclude at that sesion the full first reading of working paper 6/Add.1. At the same session the Special Commission might well be in a position to embark on a new suject, i.e., the protection of the marine environment, appearing on the list of items on which rules, regulations and procedures are still to be considered by the Special Commission (see LOS/PCN/SCN.3/1989/CRP.8). In this respect I have been assured by the Secretariat that the working paper on that subject (LOS/PCN/SCN.3/WP.6/Add.5) will be ready before the end of the year, and therefore well in advance of the next session. After it has concluded the first full reading of working paper 6/Add.5 at some time in the future, the Special Commission will continue with the consideration of any other working paper which will by that time have been prepared by the Secretariat on the basis of the list of items contained in LOS/PCN/SCN.3/1989/CRP.8.

31. During the current session I have been working with the members of the Secretariat team in Special Commission 3 on the revision of LOS/PCN/SCN.3/WP.6/Add.4 concerning the transfer of technology. Thanks to extensive preparatory work by the Secretariat in the intersessional period, I have made good progress in this field. Nevertheless, it is expected that, due to the time-consuming nature of this work, the revision of working paper 6/Add.4 will not be issued before the middle of 1990.

32. As has been agreed, the second reading of the draft regulations of the future deep sea-bed mining code will be held on the basis of the revisions prepared by the Chairman in co-operation with the Secretariat. The second reading will be held only after the Special Commission has considered all draft regulations in a first reading. Thus, the members of the Commission will be able to have a picture of the draft mining code as a whole, which will facilitate the Special Commission's work at a second reading.

33. The revisions by the Chairman should be seen as negotiating instruments in which the issues on which there were differences of opinion during the first reading have, in the view of the Chairman, been reduced in number. Revisions on the basis of a future second reading should, in principle, further reduce such issues to the smallest possible number and those remaining "hard-core" issues - in the revisions often identified in footnotes added by the Chairman - should then be submitted to final negotiations among all interested delegations.

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Eighth Session
Kingston, Jamaica
5-30 March 1990

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. Organization of Work

1. During the 1990 spring session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 13 meetings, i.e. the 107th to the 119th meeting.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 Matters utilized some of the time allocated for each meeting of Special Commission 3 for co-ordination purposes.

3. During this session the Special Commission completed its first reading of LOS/PCN/SCN.3/WP.6/Add.1 on production authorizations.

4. In its consideration of document LOS/PCN/SCN.3/WP.6/Add.5 on the protection and preservation of the marine environment from activities in the Area, the Special Commission began its work by having a general exchange of views on the document. Following that, the Special Commission embarked on an article-by-article examination of the working paper.

5. As it was apparent at the outset that owing to the complexity of the subject matter, the paucity of information on the impact of activities on the marine environment in the Area and the absence of any legal precedents, the discussion during the present session should not be treated as conclusive. Although many delegations were in a position to present preliminary views, they reserved their right to renew these discussions at the forthcoming summer meeting of the Preparatory Commission.

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II. Issues Dealt with in the Special Commission

6. At the 107th meeting, the Special Commission considered document LOS/PCN/SCN.3/WP.6/Add.1 on production authorizations. Some delegations which felt that the production policies as contained in the Convention were among the serious obstacles to the acceptance of the Convention by a number of States, stated further that in their view, inter alia, (i) the limitation of deep sea-bed mining would not benefit consumer countries; (ii) sea-bed mining would take place gradually in response to increased demand and substantially higher metal prices and, therefore, not destabilize the market; and, (iii) mining companies would not want to destabilize the market since this would have a direct effect on the economic viability of their deep sea-bed mining projects.

7. The Special Commission was also informed that the issue of "subsidized production" raised at the 1989 summer session was being addressed in the current GATT negotiations and that the results should eventually enable the specific question of deep sea-bed mining subsidies to be settled.

8. Other delegations, however, while stating their concern for a stable market for the metals produced from deep sea-bed mining were of the opinion that production authorizations were an adequate means for assuring favourable introduction of metals into the market. This opinion held that the inflexibility of deep sea-bed mining itself, that is the free market aspects of the industry, and the inertia inherent in the long lead-in time for deep sea-bed mining projects was far more important than the perceived inflexibility of the trend line in the production limitation formula.

9. From the 108th to the 119th meeting, the Special Commission considered a working paper prepared by the Secretariat (document LOS/PCN/SCN.3/WP.6/Add.5), containing draft regulations on the protection and preservation of the marine environment from activities in the Area. Introducing the working paper, the Special Representative of the Secretary-General for the Law of the Sea, Mr. Satya Nandan, said that the paper had been prepared taking into account the mandate of the Authority to adopt appropriate rules, regulations and procedures to prevent, reduce and control pollution of the marine environment arising from exploration for, and exploitation of the resources of the Area. The draft regulations drew upon a number of sources: firstly, the relevant articles of the Convention, particularly the provisions to be found in Parts XI and XII; secondly, the legislation and regulations of States concerned with deep sea-bed mining; and thirdly, other multilateral conventions such as that relating to the Antarctic mineral resources.

10. Mr. Nandan went on to state inter alia, that the most difficult aspect of the paper had been to ensure that there was a fair balance between the need to preserve and protect the marine environment, and the development of the resources of the international sea-bed area; and that the regulations sought to define the meaning of "serious harm to the marine environment" by

excluding certain effects on the marine environment arising from activities in the Area assessed or judged to be acceptable by the Authority according to the relevant rules and regulations. In so doing, the regulations ensured that deep sea-bed mining would not be unreasonably restricted.

11. In order to assess the effect of each contractor's activities in the Area, the draft regulations provide for the establishment of environmental reference zones. They expressly provide for the submission of an environmental report or an environmental impact statement, based on the relevant data collected during the prospecting stage, that has to be submitted to the Legal and Technical Commission before the approval of any plan of work for exploration. At the exploitation phase, before the Legal and Technical Commission recommended the approval of a plan of work for exploitation, each applicant would be required to submit an environmental impact statement which would contain more detailed requirements.

12. In order to assist the Authority in monitoring the contractor's compliance with the terms and conditions of the contract and with the rules and regulations relating to the protection and preservation of the marine environment arising from activities in the Area, contractors would be required to submit an annual report on the effects of their activities in the Area on the marine environment. The regulations establish a system of inspection enabling the Authority to send its inspectors on board vessels and installations used by the contractor in a form of co-operation by the Authority and by Sponsoring State or States. The provisions also provide for procedures for the emergency suspension or adjustment of operations deemed harmful to the marine environment.

13. The provisions on the liability of contractors for serious harm to the marine environment were of crucial importance for deep sea-bed mining where harm might occur beyond national jurisdiction and where harm which is likely to occur is harm to the marine environment itself rather than to a person or property. The liability article was modelled on the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities which was the first important multilateral instrument to recognize the value of the marine environment, particularly that part of it constituting the global commons.

14. Several statements were made during the general exchange of views, one of which was the need to conduct further environmental studies of the marine environment in the Area. Safe methods of exploitation could be established only on the basis of appropriate comprehensive experimental data and information on any effects of exploitation of polymetallic nodules on the living or non-living components of the marine environment and associated ecosystems. Effective monitoring of the Area was needed. In this regard, some delegations were of the view that since the start-up of deep sea-bed mining would be delayed, this would provide ample time for careful research aimed at protecting the marine environment. Some views stressed the potentially serious problems that could be posed by deep sea-bed mining. It was held that since deep sea-bed mining might not occur for many years to come, the Preparatory Commission should map out a strategy for preserving the sea-bed environment and not merely establish a set of formal procedures. This view also called for the mobilization of public opinion and governmental awareness and suggested that an ad hoc group of experts be set up to make recommendations in that connection.

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15. Another view was that the Convention recognizes that problems of ocean space are interrelated and for that reason provisions on marine research and the protection of the marine environment are interwoven in the Convention. It was felt that the situation was not as alarming or serious as had been presented by some delegations. The view was held that when deep sea-bed mining became a reality, there would be increased knowledge of how to remedy any environmental harm that might be caused. It saw little to be gained from new technical studies since specific rules were not needed at the present stage of the Preparatory Commission's work. It was further stressed that lack of scientific knowledge on the ecological impact of deep sea-bed mining should not be used to hamper or delay the Commission's work on environmental rules and regulations, since they will, in accordance with Article 209 of the Convention, have to be re-examined from time to time as necessary.

16. Many delegations were of the opinion that a seminar on the environmental impact of deep sea-bed mining and the means for assessing it, would enhance the Special Commission's knowledge to enable it to draft these regulations. In this connection, many delegations requested that at the beginning of the summer 1990 session such a seminar be convened by the Office of the Special Representative of the Secretary-General for the Law of the Sea. A number of delegations with technical data and expertise in the subject matter including some registered pioneer investors stated their willingness to co-operate in the exchange of data and make some of their experts available for the seminar.

17. The view was expressed that the information provided to the seminar could also be used as a basis for an additional contribution to the updated and expanded report on the protection and preservation of the marine environment which is to be submitted to the 1992 UN Conference on Environment and Development.

18. Most delegations acknowledged the need for the rules and regulations to be based on scientific data and knowledge of the effects of deep sea-bed mining on ocean ecosystems. Several delegations, however, questioned the norms used to establish the degree of damage to ocean ecosystems (serious harm to the marine environment). Some delegations questioned the notion of acceptable harm to the marine environment and stated their unwillingness to accept it in the absence of knowledge of the criteria that would be used to determine it. It was suggested that in using the phrase "serious harm to the marine environment" the draft rules seem to imply that harm to the marine environment would, in principle, be permitted. A concern was expressed that the scope of the draft regulations, through the adoption of these norms, had been broadened. It was suggested that this might open the door to weakening the Convention's farsighted standards.

19. On the broad mandate given the Authority to determine the threshold of environmental degradation, it was suggested that this could lead to a conflict of interest because the Authority, which would be dependent on revenue from economic activities in the Area, could be biased on favour of a permissive regulatory regime. Several delegations requested that some provisions be reformulated so that the obligations of the Authority correspond to those of a Sponsoring State. From the general exchange of

views the impression prevails that what will be needed is a balance in the mining code between, on the one hand, the interest of exploitation of the international deep sea-bed area and, on the other hand, the interest of protecting the marine environment.

Article 1. Scope of these regulations

20. In an article-by-article examination of the draft regulations (LOS/PCN/SCN.3/WP.6/Add.5), it was argued that the scope of these regulations should also apply to shipboard processing as provided for in Annex 3, article 17, paragraph 2(f) of the Convention. Several statements were made in the exchange of views on the need to clearly define the sphere of application of the regulations and to include environmental clauses in the contract. It was noted that the appropriate basis for this article in the Convention was article 192 (General obligation) and not article 209(1) (Pollution from activities in the Area).

Article 2. Use of terms

21. It was pointed out that this provision formed the basis for the regulations. Several statements were made expressing concern about using the term "serious harm" in relation to the protection and preservation of the marine environment. The view was expressed that the concept of "serious harm" could result in utilizing an economic rather than an ecological basis in the formulation of the regulations. It was further stated that the notion of "acceptable harm to the marine environment" was unacceptable without the knowledge of the criteria that would be used to determine that judgement.

22. The view was expressed that the Authority should not be empowered to set its own standards for the preservation and protection of the marine environment as provided for in article 2(2) of these draft regulations but that this should be left to experts. Several statements were made that the norms or standards used to define damage to the marine environment should, inter alia, be based on the ability to restore it, on flexible thresholds allowing for the weighing of economic and scientific values, and on article 209(1) of the Convention which envisions a periodic review of the international rules, regulations and procedures to prevent, reduce and control pollution of the marine environment from activities in the Area.

23. Several delegations proposed wording to correct a view that article 2 of the draft regulations prohibited activities in the Area. Several statements were made pointing out that many of the terms in article 2 inter alia, "significant", "negligible", and "judged to be acceptable" were subjective and that objective criteria were required. A question was raised as to why "air space" was included in the definition of marine environment. Questions were raised in respect of the meaning of "unreasonable loss" in article 2(2)(c), on who establishes the criteria for "unreasonable loss", and whether or not if the contractor could show that the loss was reasonable, the deleterious effects of its activities on the marine environment were permissible. The use of the word "benefit" in article 2(2)(c) was also queried. In this regard questions were raised as to the nature of the "benefit" i.e. scientific or economic, and the person or entity to derive this "benefit".

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24. Questions were raised in respect of the size and the factors that would be taken into account to determine the characteristics of "impact reference zones" (article 2(3)) and "preservation reference zones" (article 2(4)). With regard to "preservation reference zones" the view was expressed that the zones should be delineated before the exploration stage. It was further stated that the provision should be reformulated to go beyond merely assessing flora and fauna to include other considerations such as the water column above the mine site. A view was stated that a provision on environmentally safe technology should be incorporated in the article. Several delegations were of the view that the concepts underlying the provisions of this article should be covered in the seminar during the summer session.

Article 104. General obligation

25. The view was expressed that while the question of general obligation had been based on article 192 of the Convention, such obligation would be better linked to the obligations of States responsible for pollution in the Area under article 209 of the Convention. Another view was that the general obligation was not limited to "activities in the Area" and that it was binding on States Parties upon ratification of the Convention. This view held that since States as such do not conduct activities in the Area, it was the Enterprise and contractors who have this obligation. It was suggested that article 104 of the draft regulations be redrafted to reflect this or deleted.

26. Another view expressed was that the actual content of this article which repeats article 192 of the Convention was not sufficient. It should contain clear requirements on the protection of marine environment such as:

- the creation of sediment plumes in surface waters (upper 300 m of the water column) must be avoided;

- no introduction of waste water in the upper water column of 1000 m, where vertical plankton movement takes place;

- no dumping of waste during processing on board and during transport in order to protect surface waters;

- no dumping of tailings resulting from processing;

- constant monitoring and assessment of environmental effects during the testing of large scale pilot mining exercises during the exploration phase and during exploitation;

- contract for exploitation may only be granted on the basis of monitoring results from the exploration phase, taking into account the comprehensive environment impact statement to be submitted after the exploration and before the long-term exploitation phase begins;

- the content of monitoring obligations and of the environmental impact statement have to be defined in general rules and regulations by the Legal and Technical Commission, or preferably in a technical Annex to the Mining Code by the Preparatory Commission;

- general obligation to reduce negative environmental effects by development of specific non or low waste technology for deep sea-bed mining activities.

Article 105. Conditions for carrying out activities in the Area

27. Several proposals were made to redraft article 105. The view was expressed that article 105 (3) should be amended to make it better aligned with article 127 of LOS/PCN/SCN.3/WP.6/Add.5 (rules, regulations and procedures concerning the protection and preservation of the marine environment). Another view was that the mere availability of technology and procedures, as provided for by this article, did not ensure that they would be utilized. The regulations should require that key environmental parameters were effectively monitored. It was also suggested that the requirements should be strengthened by identifying the responsibility for ensuring compliance.

28. A contrary view was that reference to capacities in article 105(2)(b) and (2)(c) could be justified since concrete monitoring proposals would be spelled out elsewhere in the regulations.

Article 106. Exclusion of areas for exploitation

29. Several delegations were of the opinion that the provisions of the draft article should reflect the flexibility and balance required in decisions to exclude areas from exploitation. It was pointed out that technological developments in the future might make possible the safe exploitation of some excluded areas and that in some cases, harm could be prevented by restricting only certain types or degrees of exploitation.

30. It was pointed out that this article was very similar to the provisions contained in article 110(5) of LOS/PCN/SCN.3/WP/6/Add.5. It was suggested that while the provisions of this article might be applied based on data obtained from various sources, even prior to the start-up of mining, article 110(5) would apply in the case of information received from the contractor.

31. The view was expressed that the draft article should be reworded to clarify that exclusion was the maximum protective action which the Council might take and that less stringent measures were also possible. Another view was to align the wording of this article with that of article 105 and to identify responsibility for the various monitoring capabilities and decision making.

Article 107. Environmental reference zones

32. The view was expressed that the zones may be so affected that it would be impossible to preserve them. It was suggested that since activities would be taking place adjacent to the zone, they may result in downgrading the

value of zones as comparators. Another view was that experience from the high level of environmental damage in land-based mining indicated the importance of effective preventive measures in connection with future deep sea-bed mining. It was stated that the need for environmental protection and the commercial viability of mining operations had to be taken into account in choosing the location of reference zones. It was recommended that such zones should not overlap future mine sites. It was reported that the results from a site in the Peru Basin were promising. A request was made for the subject to be included in the seminar at the summer session.

Article 108. Procedure for submission of an environmental report or an environmental impact statement

33. The view was expressed that rather than transferring the procedures required under this article to article 29 (data and information to be submitted by the applicant before final approval of the plan of work) of LOS/PCN/SCN.3/WP.6/Rev.1, the guidelines could be cross-referenced in an appendix to the regulations. It was pointed out that draft articles 108 (2) and 108 (3) together with draft articles 109 (1)d, (1)e, and (1)f should be able to take care of concerns delegations have in regard to the protection of marine environment. Another view was that the article should clearly state that approval of a plan of work for exploitation may only be given on the basis of an exhaustive environmental impact statement which takes into account monitoring results of testing of large scale equipment during the exploration phase.

Article 109. Environmental impact statement

34. It was stated that both articles 108(1) and 109(1) refer to "environmental baseline data". The view was expressed that since the term might mean different things, it should be defined. It was suggested that a procedure for setting baseline environmental data be established rather than leaving it to the contractors themselves. It was pointed out that baseline data would have to be provided by the contractor concerning the environmental conditions prior to the start of the mining activities. Thereafter, the changes resulting from the contractor's activities would be monitored.

35. With regard to article 109(1)(c), it was requested that the nature of the mining tract be clarified. It was also suggested that the monitoring of the effect of activities on "fish larvae" be expanded to cover all sea life. The view was expressed that the monitoring of the effects of activities on surface plume should be omitted, since data already indicate that the plume should be released below a certain level.

36. It was proposed that the word "pollution" in 109(1)(e) be replaced by the words "serious harm". Several delegations expressed the view that coastal States that might be affected by activities in the Area should be notified. Another view was that the question of the effects on the ocean environment of activities within national borders should be addressed.

37. The view was expressed that the purpose of the environmental impact statement should be specified. It was suggested that such statements should give information on the possible environmental effects of the intended mining project. Specific timetables should be given for notifications in the event of serious environmental harm. Another view was that the process of considering the contractor's environmental impact statements should be open to public review.

Article 110. Consideration of an environmental report or an environmental impact statement

38. It was suggested that the regulation be amended to include a provision for the Legal and Technical Commission to notify coastal States of activities which could affect their interests or result in harm to their marine environment. It was also stated that the notification should not be limited to coastal States but to all States. A contrary view was that the concerns of coastal States should be satisfied by the existing provisions in the draft rules. The view was expressed that the provisions of draft article 110(5) on exclusion of parts of an application area where substantial evidence indicates serious harm to the marine environment was incompatible with draft article 106. It was also stated that there was a need to identify the responsibilities of various entities regarding monitoring and notification.

Article 111. Terms and conditions for the protection and preservation of the marine environment

39. The view was expressed that this draft article should be clarified to make clear who sets the conditions for the monitoring plan. It was suggested that the contractor should have a model which should be made available to all interested parties. It was felt that the requirements to avoid serious harm (article 111 (b)) should be uniform and spelled out in the regulations for all contractors and the Enterprise. Several delegations requested that the words "where practicable" in draft article 111(c) should be deleted.

Article 112. Contingency Plans

40. The view was expressed that contingency plans play a crucial role in the draft regulations for the protection and preservation of the marine environment. It was pointed out that draft articles 105, 108, 109, 110, 111, 114, 119 and 120 all contain elements or procedures related to contingency plans. Several delegations, while noting the importance of contingency plans, supported defining the responsibilities of all parties concerned in contingency plans in order to avoid serious implementation problems in the event of an emergency. The view was expressed that the Special Commission in drafting regulations draw upon the language of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. It was proposed that the Secretary-General of the Authority should be given much greater discretionary powers than that accorded him under the text at hand.

41. The view was expressed that draft article 112 should be clarified to reflect that it is the contractor who has to establish the contingency plan to enable it to effectively prevent and control certain levels of harm. Another view was that contractors should notify relevant international organizations and coastal States. Contractors should also co-operate with the environmental protection institutions of Sponsoring States. It was also proposed that the role of inspectors should be clarified in connection with emergency incidents and other situations.

42. It was suggested that an ad hoc working group on contingency planning be established to set guidelines for such plans in an appendix to the regulations so that they can be easily revised and updated. The view was expressed favouring an integrated notification system rather than the several systems specified in the draft article. It was proposed that the relevant systems developed by the International Atomic Energy Agency, the World Meteorological Organization and the United Nations Environment Programme should be reviewed in connection with drafting the guidelines for contingency plans.

43. The view was expressed that the draft article should set limits on the assurances a contractor must give the Authority in the light of insurance coverage he might be required to carry.

44. Another view was that reference should be made in the draft article to cases in which harm to the marine environment had already resulted. Monitoring should be carried out continually, whether or not the marine environment had been harmed. It was also stated that justification existed for requiring multiple contingency plans to cope with various types of emergencies. The types of plans to be required should be classified so that all aspects would be included in an overall contingency plan. The contingency plan would require "periodic simulation exercises" in order to prepare the contractor's staff for emergencies. The view was expressed that it would also be important to include in contingency plans the question of how best to handle inquiries from the media in order to prevent misinformation being disseminated.

Article 113. Annual reports

45. The view was expressed that contractors should not be required to submit numerous reports but that the exact content of a single overall report should be defined by the Special Commission at a later date. Another view was that such a large report which might contain confidential material should not be made public. It was suggested that to overcome that problem noted above the report of the inspectors (article 115) should be summarized and made public since it would be relevant to public concerns. Alternatively, it was proposed that States might be given access to the reports, even if parts of the report were confidential. It was stated that States might be informed in a different way than the public at large since they bore responsibility to maintain ecological standards.

Article 114. Reports of serious harm to the marine environment

46. The view was expressed that the draft article did not indicate whether the contractor would be required to state the nature of the damage done. It was felt that such information would determine the nature of the response. Another view was that a provision should be included requiring the Authority to immediately dispatch inspectors to the affected area. A question was raised as to the limits on the assurances that the contractor must give. It was pointed out that this question was important because it is related to insurance coverage and what constitutes serious harm.

Article 115. Inspectors

47. Several delegations were of the view that since the draft article did not give enough power to inspectors on-site, permanent on-site inspectors would be better for the protection and preservation of the marine environment. A question was raised as to what would happen if a contractor refused to allow an inspector on board its vessel and whether or not the Authority was in a position to do anything about those circumstances. It was proposed that a training programme for inspectors should be established and that measures be taken to ensure that monitoring of the marine environment in the Area took place continually should be established.

Article 116. Compliance

48. The view was expressed that the draft article, along with article 117 (Obligations of the Sponsoring State) and article 121 (Responsibility of the Sponsoring State or States), was the basis for the liability system of these draft regulations and as a result should envisage circumstances where contractors were unable to meet clean-up costs. It was argued that this liability system should have the highest degree of certainty of remedy with private law remedies as its cornerstone. It was suggested that it could consist of a three-tiered structure:

Tier 1: Compulsory insurance, bonds and parent company guarantees;

Tier 2: An industry fund, supported by deep sea-bed mining companies to ensure that remedies are available under the following circumstances:

- where a contractor was unable to meet its financial obligations;
- where there was a defense to liability (article 122(3)(a) and (b)); and,
- where there was an indeterminate origin of harm.

Tier 3: Residual liability or liability not covered in Tiers 1 and 2 which would be borne by Sponsoring States and States Parties.

49. It was suggested that in this structure, residual liability would have an extremely low probability of occurrence. It was proposed that this form of remedy be added in a separate article.

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50. Several delegations expressed the view that the relationship between paragraphs 1 and 2 of the text was unclear. Many delegations were of the opinion that paragraph 2 was a weaker obligation and should be placed elsewhere in the provisions. A contrary view was that paragraph 2 was a new obligation and that it should be deleted. The view was expressed that since the words "including the coastline ..." were already included in article 2 on use of terms, they should be deleted in paragraph 1,.

Article 117. Obligations of the Sponsoring States

51. Many views were expressed on this article relating paragraph 1 (on a Sponsoring State's obligation to inspect its contractor's activities) to article 122(4) (the non-liability of a Sponsoring State's for its contractor's activities) and to article 115 (inspectors), and paragraph 2 (number of Sponsoring States and fulfillment of obligations) to article 139(2) of the Convention.

52. The view was expressed that since paragraph 1 touched on the use of inspectors and the power of inspection it should be shifted to another section of the regulations along with article 115 (inspectors). Another view was that the responsibility for inspection should be clearly defined. It was suggested that there would be problems if there were two systems of inspection i.e. one by the Authority and the other by Sponsoring State. It was stated that a Sponsoring State's inspectors could only conduct inspections to verify compliance with its national law. In that context and in reference to article 122(4) the query was made as to who would verify whether a State Party "has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction" as provided for in that article.

53. The view was expressed that the language of paragraph 1 should be broadened beyond shipboard activities so as to read "monitor its contractor's activities". Another view was that since reports from the Authority's inspectors were transmitted to the Secretary-General but those from Sponsoring States inspectors to the Council, harmonization was required. Still another view was that article 117,(1) was not needed.

54. With regard to paragraph 2, the view was expressed that it places responsibility on one State while article 139(2) of the Convention recognizes joint and several liability.

Article 118. Rights and legitimate interests of coastal States

55. The view was expressed that the provision should not only apply to coastal States but to any State likely to be affected by activities in the Area. Clarification was sought on remedies for damage which might occur, on how the functions of the Authority would be defined in the event of an emergency, and whether or not the Authority would have the facility to investigate and recommend appropriate action to the affected States.

56. Several delegations were of the view that the terms "coastline" and "land territory" in paragraph 1 should be deleted since "marine environment" was already defined in article 2.

Article 119. Emergency orders

57. Discussions of article 119 focussed primarily on two issues:

- whether or not empowering the Secretary-General to take any immediate measures to prevent serious harm to the marine environment pending a decision by the Council, did not go beyond the powers given him by article 166(3) of the Convention, and

- the linkage between this article and article 120 (Authority to take measures to protect and preserve the marine environment).

58. Several delegations supported granting limited emergency powers to the Secretary-General It was noted that accidents did not always happen according to plan and that emergency powers needed to be in the hands of an individual who could take appropriate measures. A contrary view was that article 166 of the Convention identified the Secretary-General as the chief administrative officer of the Authority, giving him only administrative functions. It was stated that the emergency powers provided for in the draft article went beyond administrative functions.

59. The view was expressed that a link existed between the monitoring function of the Authority and contingency plans. It was suggested that the Council draw up a contingency plan for implementation in emergencies by the Secretary-General pending action by the Council. It was pointed out that since article 119 and article 120 provide for action by the Authority in the event of a contractor's failure to comply with requirements, the text should be reworded, inter alia, to limit the scope of the remedial action to be taken by the Authority on behalf of a contractor, to provide for reimbursement by the contractor, for the Authority to assume costs arising out of remedial actions for harm caused by the Enterprise, and to require Sponsoring States to contribute to reimbursement, particularly when they failed to obtain compliance from the contractor.

Article 120. Authority to take measures to protect and preserve the marine environment

60. A question was raised with regard to the scope of the measures the Council could take in the cases of contractor default either by not taking the action required by the terms and conditions of its contract or by acting in breach of the article on compliance. A question was also raised in connection with the meaning of "through arrangements with others".

Article 121. Responsibility of the Sponsoring State or States

61. The view was expressed that certain elements in the article went beyond the question of environmental protection. It was suggested that such issues should be covered in a general section of the mining code. It was stated that responsibility should connote a positive obligation rather than

liability in the event of a violation. Another view was that a distinction should be made between the responsibilities of the Sponsoring State and those of the contractor. It was suggested that the liability of the Sponsoring State should be assumed unless it adopted the desired legislation.

Article 122. Liability for serious harm to the marine environment

62. The view was expressed that strict liability for quantifiable environmental damage should be considered in an effort to maintain high standards for the environment. Another view was that the article was complex, requiring, inter alia, a separation of the liabilities assumed by contractors and Sponsoring States. It was observed that the system as provided for in the draft article placed the burden of proof on the respondent. It was also stated that the question of liability for environmental harm warranted further study since it was unprecedented.

63. The view was expressed by several delegations that the liability and responsibility rules should be of a general nature. More detailed and specific rules could be added at a later stage. The issues of insurance and reparation funds must be resolved. A reasonable balance between preservation of the environment and sea-bed mining must be struck.

64. The view was expressed that while emphasis should be on preventive measures, liability rules could also serve as incentives to use safe technologies and to remedy any serious harm to the environment and third parties. It was stated that overly demanding or vague rules would produce a negative selection of mining enterprises by attracting contractors who were willing to assume excessive risk. Defective implementation of such rules would add further incentives to engage in hazardous activities.

65. Several delegations were of the view that a uniform regime on third party liability which would extend beyond environmental damage should be placed in a separate article. It was stated that in the present wording of the article no distinction was made between wrongful and legitimate activities. It was also stated that the contractor's liability under Article 22, Annex 3 of the Convention was different from that outlined in this draft regulation.

66. The view was expressed that the determination of harm to the environment should be carried out jointly by the contractor and the Authority and should not be based on the opinion of the Council alone. Similarly, third party damages should not be determined by the Council alone. It was stated that contractors should be relieved in proportion to the extent to which damage had resulted from neglect on the part of the party seeking redress. It was also suggested that a provision should be drafted to cover the liability of the Authority for unfounded decisions of its bodies.

67. In respect of paragraph 1 of article 122 the view was expressed that there is no differentiation between the general obligations of the contractor and his specific responsibilities in case of serious harm to the marine environment.

68. Another view was expressed that paragraph 1 contains a substantive provision which is not a liability provision and should therefore be placed elsewhere in the regulations. The relationship of this paragraph with article 116 and paragraph 2(a) of article 122 must be clarified.

69. The view was expressed that if the Authority was to receive payment under paragraph 2(a), it should be used to repair the environmental harm. It was pointed out, however, that problems could arise in proving whether sufficient action had been taken. A question was raised as to when the Enterprise would be expected to pay the Authority.

70. Several delegations questioned the meaning of terms used in paragraph 2 of article 122. It was suggested that the words "serious harm" in paragraph 2(a) should be changed to "harm". The expression "serious harm" might imply that a contractor is not liable for " harm". Clarification was sought on the criteria for determining "reasonable costs". It was also suggested that, for consistency, the word "damage" in paragraph 2(b) be replaced by the word "harm". It was proposed that the word "directly" in paragraph 2(b) be deleted. Another view was that paragraphs 2(b) and 5, should be deleted because their provisions had nothing to do with the environment.

71. It was also emphasized that the contractor's liability should be qualified as strict liability rather than fault liability. Another view was expressed that a connecting link between subparagraphs 2(a) and 2(b) must be established in order to draw distinction between harm to the marine environment and harm to the third party.

72. Several delegations expressed the view that paragraph 3 could be condensed by using reference to "force majeure". The suggestion was made that the paragraph should be drafted in positive terms and that the elements not covered by international law should be eliminated.

73. A number of delegations suggested to move the provision contained in paragraph 4 of article 122 to article 121 dealing with the responsibility of the Sponsoring States.

74. The view was expressed that the reference to "applicable law and procedures" contained in paragraph 5 of article 122 was not clear.

75. The question was raised in relation to the nature of "existing rules on liability" referred to in paragraph 7(a) of article 122, whether these were of a national or an international character.

76. The view was expressed that the procedure in paragraph 8 of article 122 should be more elaborate.

77. It was suggested that the reference to "such damage" contained in paragraph 9 of article 122 should be more specific and the expression "any party to the dispute" precisely defined.

78. A question was raised in respect of paragraph 10 of article 122, whether arbitration tribunal's decision could be enforced in the territory of each State Party and whether there was a mechanism for such an enforcement.

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Article 123. Penalties

79. The view was expressed that there should be a separate article or chapter on penalties which would apply to the mining code as a whole. Many delegations felt that the subject matter covered too much ground to be in one article. On the one hand, it was suggested that penalties should be regrouped to proceeded from the lightest measure up to suspension or termination, and that the degrees of violation and environmental harm should be classified. On the other hand, a preference was stated for separate articles on suspension, termination and penalties.

80. The view was expressed that the text did not conform to world-wide legal standards and rules. It was stated that the question of penalties could be settled without more detailed knowledge on environmental impact. It was also stated that the question of penalties should be linked to categories of violations in a separate article and be cross-referenced to the provisions of payment to the Authority.

81. Several delegations expressed the view that the stipulation that the contractor's activities had to be "persistent" and "wilful" left room for argument. It was stated that it was extremely difficult to determine which actions were "wilful". The concept of "fundamental terms" of the contract would require a determination of what was and what was not fundamental. It was emphasized that a serious violation of the fundamental terms of the contract might not necessarily result in serious harm to the marine environment.

82. It was suggested that a series of warnings about contractors' violations seemed wrong because such a system allowed too much harm to the environment. It was stated that the contractor could use the absence of such warnings to prevent the suspension or termination of a contract in the case of serious environmental damage.

83. It was suggested that the article should take into account that certain types of violations might not result in serious harm. Another view was that penalties should be imposed in the event of "gross negligence" which could result in serious damage to the environment. It was also suggested that suspension might result in greater loss to the contractor than a monetary penalty.

84. The view was expressed that different types of sanctions should apply to the violations taking place at different stages of the sea-bed activities. The differentiation should be drawn between the exploration and exploitation stages. Clear standards are necessary in this respect. The monetary penalties referred to in paragraph 2 should not overlap with payments made in accordance with article 122.

85. The point was made that the Authority should not have discretionary powers to determine the types of sanctions.

Article 128. Disputes

86. The view was expressed that disputes concerning the interpretation or application of the regulations on protection and preservation of the marine environment should be submitted only to the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. Any reference in this respect to the arbitration tribunal constituted in accordance with annex VII of the Convention should be eliminated.

87. Another view was expressed that according to article 187 of the Convention, the Sea-Bed Disputes Chamber shall have jurisdiction in respect of disputes between parties to a contract concerning (a) the interpretation of a relevant contract or a plan of work and (b) acts or omissions of a party to the contract relating to activities in the Area. It was also emphasized that according to article 188, paragraph 2, of the Convention, disputes concerning the interpretation of a contract referred to in the above-mentioned article 187 shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree.

88. Finally it was suggested that there should be a separate chapter on settlement of disputes applying to the Mining Code as a whole.

III. Evaluation of progress and programme of work at future sessions

89. Special Commission 3 made a commendable effort by concluding a preliminary first reading of document LOS/PCN/SCN.3/WP.6/Add.5, thereby enabling delegations to prepare inter-sessionally for the full first reading at the summer session in New York (13-31 August 1990). In view of the many suggestions made during this spring session, I would expect that delegations will use the inter-sessional period to study the proposals made and to draft any amendments they deem necessary to the text submitted by the Secretariat so as to facilitate the work during the three-week summer session.

90. As Chairman of Special Commission 3, I have requested the Secretariat to follow up on the suggestions for a seminar to be held during the first few days of the summer session on the effects of future deep sea-bed mining on the marine environment. The seminar should have the same format as the seminars Special Commission 3 has held on the financial terms of contract (August 1986), deep sea-bed mining technology (August 1988) and the production limitation formula (August 1989). The experts invited to contribute to the seminar will, as usual, do so on a personal basis and without financial implications for the United Nations. The seminar should give delegations a better insight into the environmental impact of deep sea-bed mining and the means of assessing such impact. Delegations that have supported the idea of a seminar might be contacted by the Secretariat with a request to provide speakers.

91. Furthermore, I suggest that during the session in New York two working groups be convened in the time allotted to Special Commission 3:

- one on the draft articles of WP.6/Add.5 which relate to the environmental aspects, such as the articles on the use of terms, conditions for carrying out activities in the Area, environmental reference zones, preservation reference zones, contingency plans and emergency orders; and

- one on the draft articles of WP.6/Add.5 which relate to legal questions, such as responsibility of States, liability of contractors, penalties and dispute settlement procedures.

92. The working groups, which may be chaired by a Vice-Chairman or an expert delegate, will be requested to report regularly on the progress they make in order to facilitate the work of Special Commission 3 in conducting its full first reading of WP.6/Add.5.

93. In practical terms, where the organization of work at the summer session and, in a longer perspective, also at the Spring Session in 1991 is concerned, this could mean that Special Commission 3 might wish to do the following:

Summer Session 1990

94. The first week (five meetings) could be given over to the seminar, i.e. on Tuesday or Wednesday, or on Wednesday and Thursday, with a meeting on Friday for the Special Commission to decide on the organization of work. The second week might be given over to the working group on environmental matters during the first half of the week, and to the working group on legal matters during the second half, each of them reporting on the progress of their work to the Special Commission 3 at the beginning of the third week. The remainder of that week could then be devoted to more meetings of the working groups and a last plenary meeting of Special Commission 3 in order to assess the overall progress of work.

Spring Session 1991

95. If Special Commission 3 adopts this approach, delegations will be in a position to study the reports of the two working groups in the inter-sessional period and they may wish to use the first week of the spring session to comment on them. Thereafter, the working groups could meet if necessary. Consequently, Special Commission 3 might be able to finish the full first reading of WP.6/Add.5 during the last week of that session.

96. In order to make this proposed programme of work possible I have requested the Secretariat to see to it that, in accordance with Special Commission 3's needs as expressed in document LOS/PCN/SCN.3/1989/CRP.8, fifteen meetings at each session will be scheduled for Special Commission 3. It would seem to me that other Special Commissions have advanced so much that some of their meetings might be allotted to Special Commission 3 which is still in the phase of first readings of the Secretariat drafts.

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97. As will be recalled, Special Commission 3 will conduct a second reading of the relevant documents only after it has finished its first reading of all parts composing the deep sea-bed mining code. In document LOS/PCN/SCN.3/1989/CRP.8 I have set out the future programme of work of Special Commission 3 and a list of remaining items to be considered. Assuming that the rules and regulations on such subjects as the standard terms of contract, accounting principles and procedures, labour standards, joint venture arrangements, dispute settlement procedures and accommodation of other activities in the marine environment of the Area will be drafted and issued by the Secretariat in due time, I feel that Special Commission 3 will need, after the summer session in New York, at least four sessions of 15 meetings each to complete a first reading of the remaining parts of the mining code, as was suggested in CRP.8. As soon as the Special Commission has finished the first readings of the Code it will have to concentrate in a second reading on the following documents:

(a) LOS/PCN/SCN.3/WP.6/Rev.1 of 6 June 1988 containing draft regulations on the content of applications for approval of plans of work and the procedures relating thereto;

(b) LOS/PCN/SCN.3/WP.6/Add.2/Rev.1 of 25 May 1989 containing draft regulations on financial terms of contract and financial incentives;

(c) LOS/PCN/SCN.3/WP.6/Add.4/Rev.1 containing draft regulations on the transfer of technology until ten years after commencement of commercial production by the Enterprise. This document will be issued between the spring and the summer Sessions of 1990.

98. The above documents are working papers drafted by the Secretariat which have been revised by the Chairman of Special Commission 3 on the basis of the full first readings, i.e. taking into account all written and oral amendments and/or suggestions submitted by delegations with a view to presenting to them compromise solutions for ("hard core") issues that became apparent in the course of the debates.

99. Document LOS/PCN/SCN.3/WP.6/Add.1, containing draft regulations on applications for production authorizations and procedures relating thereto, will be submitted to the Special Commission for a second reading in its original form, because the first reading which was formally concluded during the first few days of this spring session, has not provided the Chairman of Special Commission 3 with sufficient concrete suggestions to modify that part of the future mining code and issue a revision. It may, however, well be that during a second reading the positions of delegations will develop in such a manner that the Chairman will be enabled to come up with proposals to broaden the support for the draft regulations.

100. Document LOS/PCN/SCN.3/WP.6/Add.5, containing draft regulations on the protection and preservation of the marine environment from harmful effects of activities in the Area, will also require a second reading, hopefully in a revised form in terms of both structure and substance on the basis of the full first reading which the Special Commission 3 will commence at the summer session of 1990 (after the seminar) and, in all likelihood, continue at the spring session of 1991.

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101. As will be clear from the above, Special Commission 3 will not be able to finish its work by the middle of 1991, the target date set by the Preparatory Commission last year. In order to mark that target date, I have suggested to the Chairman of the Preparatory Commission that the Commission prepare and publish by the middle of 1991 a "comprehensive interim stock-taking report" - assuming that by the time the Convention has not yet entered into force. By doing so the Preparatory Commission will place itself at the summer session of 1991 in a position to assess the progress made over the more than eight years since the beginning of its work in 1983. On the basis of such a report the Preparatory Commission will be able to take a fresh look at its accomplishments and the work that remains to be done and to set priorities accordingly.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3
ON THE PROGRESS OF WORK IN THAT COMMISSION

Corrigendum

Page 10, paragraph 42, lines 6 and 7

For World Meteorological Organization read International Maritime Organization

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New York, 13 August-31 August 1990

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1990 summer session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 11 meetings, i.e., the 120th to the 130th meeting.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 Matters utilized some of the time allocated to meetings of Special Commission 3 for co-ordination purposes.

3. During the session the Special Commission commenced its first reading of LOS/PCN/SCN.3/WP.6/Add.5, part VIII of the draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area: Protection and preservation of the marine environment from activities in the Area. The Special Commission had held a general exchange of views on the document during the spring session at Kingston. That exchange of views had been quite extensive and many of the issues raised then were reiterated during the current session.

4. For the sake of brevity many of the issues raised in Kingston are not reflected in the present report since they are contained in the Chairman's statement to the plenary contained in document LOS/PCN/L.79. The present report should be read in conjunction with that statement in order to understand fully the extent of the discussions held.

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II. SEMINAR ON ENVIRONMENTAL ASPECTS OF DEEP SEA-BED MINING

5. The Special Commission began the current session by devoting four meetings to a seminar on the environmental aspects of deep sea-bed mining. Experts from the Federal Republic of Germany, France, Norway, Sweden, the Union of Soviet Socialist Republics, the United States of America, Japan and India participated in the seminar in their personal capacities as guest speakers. Among the issues addressed by the seminar were: environmental aspects of deep sea-bed mining; characteristics of the deep-sea environment; chemical analysis in assessing the environmental impact of sea-bed mining; the relationship between manganese nodule formation and the sedimentary processes in the Clarion-Clipperton area, and its importance for environmental impact studies on deep sea mining in one test area; the impact of sea-bed mining activities over time and space; field and computer simulation for predicting the impact of sea-bed mining on the ocean environment; characterization of manganese nodule processing wastes; the present state of sea-bed mining and environmental research in Japan; the Deep Ocean Mining and Environmental Study (DOMES); relevant research conducted at the Scripps Institution of Oceanography; the need for large-scale experiments and monitoring; the status of sea-bed mining in India; the role of environmental reference zones; optimization of international reference areas and the application of the "precautionary principle" in assessing the impact of deep-sea mining.

6. It is not the intention here to summarize the discussion and the conclusions of the seminar other than to state that its predominant theme was that very little was known at present regarding the consequences of deep sea-bed mining and that it was clear that more substantial research would have to be conducted before any concrete conclusions could be reached. However, it was acknowledged that the information and relevant data provided by the experts would be very useful while dealing with the draft articles of the mining code relating to the protection and preservation of the marine environment. The Office for Ocean Affairs and Law of the Sea does however plan to publish a special edition of the Bulletin which will contain the proceedings of the seminar.

III. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

7. At the conclusion of the seminar, the Special Commission commenced the article-by-article examination of document LOS/PCN/SCN.3/WP.6/Add.5, the draft regulations on the protection and preservation of the marine environment from activities in the Area.

Article 1. Scope of these regulations

8. It was pointed out that given the current prospects for deep sea-bed mining the Special Commission should take the required time to develop adequate precautionary measures to preserve the marine environment and that it was a credit to the authors of the United Nations Convention on the Law of the Sea that they had placed such emphasis on environmental considerations at that time when such issues were not yet in the forefront. It was stressed that much work was needed to be done to refine the wording of certain articles in WP.6/Add.5 covering the scope, terminology, the rights of coastal States and other questions.

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9. Another view expressed was that it should be made clear that the rules contained in WP.6/Add.5 were not the only rules aimed at protecting the marine environment and that those rules should also provide flexibility to allow for environmental measures of a higher standard within the contract if agreed to by the parties. A query was raised as to whether prospecting was deliberately not included in the scope of the regulations and several delegations stated that they favoured the inclusion of prospecting within the scope of the regulations.

Article 2. Use of terms

10. It was suggested that the definition should take into account shipboard processing of nodules and there were other suggestions to substitute certain terms in the article, e.g., to replace "atmospheric" by "chemical"; to replace "coastline" by "coastal area".

11. Several delegations had questioned the use of the term "serious harm" during the spring session at Kingston. A lengthy debate was held regarding the use of the term and among the proposals to change it was the term "unacceptable change". That suggestion was not supported by some delegations since they considered it too vague. They felt they could not support the establishment of an environmental committee under the Legal and Technical Commission for the purpose of developing objective environmental standards and making recommendations on environmental matters. They were of the opinion that environmental standards would be established in the mining code, i.e., by the Preparatory Commission, and therefore an Environmental Committee would not be needed.

12. It was further pointed out that several terms used in the article were rather vague and raised certain problems. It was suggested that when more knowledge on the subject had been accumulated more precise phrasing could be adopted. Another proposal was that a distinction should be made between the provisions relating to liability and those concerned with prevention of pollution.

13. Finally it was suggested that preservation reference zones should include a stable reference framework not only for the benthic region but also for the superjacent water column including its upper layer and it was important to ensure that the zone allowed for the study of the overall ecosystem.

Article 104. General obligation

14. Several delegations believed that the reference to the obligation of States to preserve the marine environment was superfluous since it was specified in the Convention itself. It was also proposed that new wording be included calling on the Enterprise and the contractors to take all necessary measures to protect the marine environment from activities in the Area and to ensure that no serious harm resulted in the marine environment or coastal areas from such activities including the dumping of wastes. This proposed provision would also call on contractors to ensure adequate training of personnel.

15. However, it was pointed out on the other hand if this provision were to go into detail about the obligations of the contractor and the Enterprise, the

obligation of States might be left unclear. It was important that liability had to be borne by sponsoring States for activities conducted by those under their jurisdiction that might cause harm to the marine environment. It was suggested therefore that States must be bound by the general obligation of protecting the marine environment.

16. Another view was that no matter how the present text was revised the reference to the obligation to co-operate with the relevant international organizations should be left intact.

17. Another point of view was that continuous monitoring of activities in the Area was indispensable in the light of the information presented in the seminar and that such monitoring even within a single mining site would be highly desirable.

Article 105. Conditions for carrying out activities in the Area

18. It was suggested that the reference to the role of the Council and the Legal and Technical Commission did not belong in article 105 and should be included in a new article. It was also pointed out that it was confusing to allow no activities unless they caused serious harm while on the other hand providing for liability in the event of such harm. It was felt that the concept of serious harm should not be dealt with in this article but should be incorporated in the rules relating to liability.

19. It was also felt that giving the Authority the mandate to set the necessary technical standards in due course would facilitate the reconciliation of contrasting considerations involved in regulating the environmental aspects of deep sea-bed mining, i.e., economic and technical feasibility on the one hand and the protection of the environment on the other.

Article 106. Exclusion of areas for exploitation

20. One point of view expressed was that the approval of a plan of work was contingent on the Authority securing several prerequisites. Averting serious harm to the marine environment was only one such prerequisite and therefore it was important that the procedures for approving those plans should be taken into account in order to avoid placing excessive burden on the contractor.

21. Another point of view was that the exclusion of areas for exploitation by a contractor should not be applied categorically but rather under a graduated system of warnings and appeals. Other delegations stated that they did not agree with the suggestion for graduated warnings but would support a system for appeals to be established.

22. It was also proposed to add a provision covering a number of principles to be observed in the disposal of waste products at sea. This was related to the suggestion made under article 2. It was pointed out that smelting might take place at sea and provision therefore had to be made for the safe disposal of "tailings", i.e., waste materials. It was also important to address the need to develop low-waste mineral processing technology for use at sea.

Article 107. Environmental reference zones

23. It was suggested that such zones should be established before a plan of work was drawn up and that the requirements of such zones be more precisely defined. It was felt that the present wording did not indicate whether the zones would represent a percentage of the Area being mined or whether they would be linked to the rate of mining activity to be carried out by a contractor.

Article 108. Procedure for submission of an environmental report or an environmental impact statement

24. It was proposed to change the wording of paragraph 1 to make clear that environmental data would not be gathered only during the prospecting phase but would continue to be updated during the exploitation phase and that exploitation should begin only after the Legal and Technical Commission had had an opportunity to study the contractor's environmental impact statement.

Article 109. Environmental impact statement

25. One proposal was to amend the text to take into account the possibility of plume effects on phytoplankton and zooplankton at various water levels including fish larvae and not to limit analysis to the effects on those fish larvae only.

26. It was pointed out that the references to "a contingency plan" should be harmonized and a question was raised that if serious harm could result from routine mining activities how could such activities have been authorized under article 105.

27. It was also proposed that in relation to routine operations the text should call for "minimizing pollution" of the marine environment while the words "serious harm" should be used in reference to accidents.

28. However, it was pointed out that the term "serious harm" was ambiguous and might suffice if it referred to accidents but if it was related to systematic harm caused by the contractor's activity in the Area, it had to be clarified. It was therefore suggested that the term "serious harm" should be deleted. It was also suggested that the relationship between such harm and the contractor's choice of equipment was not clear.

Article 110. Consideration of an environmental report or an environmental impact statement

29. It was suggested that environmental impact statements be made available for an adequate period of public review since there was a paucity of environmental information and that by making such statements available for scrutiny institutions and individuals with the requisite knowledge would have an opportunity to submit relevant information to the Legal and Technical Commission to assist it in considering applications from contractors.

30. Another suggestion was that making impact data available to the public should be done in such a way that it should not impinge on the commercial interests of the

applicant and that provision for independent assessment should be linked to the finding of incomplete or defective data in the applicant's impact statement.

31. Another point of view was that the Convention provided for a clear decision-making process on environmental impact statements and therefore the proposal to make available such statements to the general public would introduce an extraneous element. It would make the decision of authorized bodies contingent on public approval.

32. It was pointed out that the Authority would regulate activities in the deep sea-bed area on behalf of mankind as a whole; thus a separate "public" having its own legal personality should not be introduced in the mining code.

33. Another point of view was that the requirements stated in article 109 that environmental statements be made publicly available were sufficient. It was also suggested that article 110 should be amended to provide for obtaining the advice of independent experts. In assessing whether an applicant had fulfilled the requirements, paragraph 5 should authorize the Council to exclude parts of the application areas in cases where evidence indicated "serious risk" that the proposed activities might result in serious environmental harm.

Article 111. Terms and conditions for the protection and preservation of the marine environment

34. Several references were made to the term "serious harm" within the context of the article. Many of these were made vis-à-vis other articles during the discussions in Kingston as reflected in document LOS/PCN/L.79 as well as during the current session and can be found elsewhere in the present report.

35. It was proposed that the term "where practicable" should be deleted since contractors were required to use the best available technology and there was no need for such a qualification.

36. It was also suggested that the information available on the environmental consequences of deep sea-bed mining was currently very limited. Therefore the mining code should be as basic as possible with specific or more precise requirements to be defined at a later stage.

Article 112. Contingency plans

37. It was recommended that the language referring to contingency plans should be harmonized and that the provisions set forth in article 111 should be linked to those found in article 105 on conditions for allowing mining to be carried out.

38. It was also pointed out that it was not clear who would be responsible for carrying out actions described in this article, but it was suggested that since the presumption was that the contractor would be under the jurisdiction of the sponsoring State the contractor should have the responsibility of elaborating contingency plans.

39. Doubts were raised about the use of qualifying terms relating to the requirements to remove polluting substances and to reduce and mitigate environmental harm. It was suggested therefore that phrases such as "as appropriate" and "as far as possible" left too much to the contractor's subjective judgement.

40. It was also pointed out that it would be difficult to remove water-soluble substances from the ocean or the atmosphere and therefore only their reduction should be required.

Article 113. Annual reports

41. It was suggested that the article should be revised so that all contracts could be considered on the same footing on the basis of relevant rules and regulations.

42. Doubts were expressed about the usefulness of making the reports publicly available since there were concerns about the confidentiality of parts of the reports submitted to the Council. On the other hand other delegations believed the requirement that the reports be made public should be retained.

Article 114. Reports of serious harm to the marine environment

43. It was suggested that mechanisms be set up in order to ensure prompt communications between the Authority and regional organizations responsible for protecting the marine environment as well as to provide that the report concerned would also be made available to affected coastal States.

Article 115. Inspectors

44. It was pointed out that provisions should be made in order to ensure that the Authority's inspection would take place at the same time as that of the monitoring States. Furthermore, it was said, it was not the inspectors' task to monitor the effect of the contractor's activities on the marine environment, only whether the contractor had fulfilled his obligations.

45. A question was raised as to what would happen if sponsoring States did not carry out inspections. It was pointed out that within the context of monitoring compliance with the contract, the inspector had to ensure that there was total compliance with the environment regulations contained in the mining code and thus the inspector would in fact be monitoring the environmental effects of the contractor's activities.

46. Several suggestions were made to change the term "monitoring" since it could mean a long-term activity requiring to be monitored. It was suggested that a better term might be "inspection", or "verification", which implied an activity of a short-term duration.

47. Another point of view questioned the usefulness of requiring that the Authority's inspection be compatible with those of sponsoring States and it was

suggested that this provision be deleted. However, it was pointed that there might be a need to provide for the harmonization of the mechanisms for carrying out the various inspections.

Article 116. Compliance

48. It was suggested that the question of compliance could better be dealt with in the context of general obligations and it was proposed to combine this article with article 104.

Article 117. Obligations of the sponsoring State

49. It was pointed out that there was precedent under other international agreements that inspectors who detected problems in the activities of contractors could order the cessation of activities until the problems were rectified. Document LOS/PCN/SCN.3/WP.6/Add.5 did not contain such an obligation and if an inspector's report was to be worthwhile there had to be the requirement that the contractor respond promptly to the issues raised in the report. It was also pointed out that it would be difficult to establish sponsoring States' liability if they did not have the right to conduct regular inspections of the contractor's operations.

50. It was suggested that in cases where there were two or more sponsoring States they should have a joint responsibility to inspect a mining project as well as joint liability. On the other hand doubts were expressed as to whether the draft rules should deal with the responsibility of States. States should not be obligated by the mining code to monitor compliance with its provisions. On the contrary, they should have the right to inspect operations under their jurisdiction.

51. Another suggestion was that sponsoring States should be obliged to conduct inspections because such activity was a prerequisite for liability. It was proposed that in order to avoid confusion about the responsibilities of several sponsoring States, one State should be assigned to act for the others and the question of liability could be settled among the States concerned.

Article 118. Rights and legitimate interests of coastal States

52. It was suggested that the notifications from coastal States should also be transmitted to the Legal and Technical Commission and the Council.

Article 119. Emergency orders

53. It was pointed out that the powers conferred on the Secretary-General under the article were too wide and were not included under article 166 of the Convention. It was proposed that these powers be reserved for the Council.

54. On the other hand it was pointed out that since the Secretary-General would be exercising these powers in emergency cases only, the Council or the Legal and Technical Commission should confer these powers on the Secretary-General for the duration of the emergency only.

Article 120. Authority to take measures to protect and preserve the marine environment

55. It was suggested that the role of the Council should be confined to issuing emergency orders while clean-up measures should be the responsibility of the contractor.

Article 121. Responsibility of the sponsoring State or States

56. One point of view expressed was that the drafting of the article needed improvement and it was pointed out that article 139 of the Convention was clearer on the question of States' responsibilities.

Article 122. Liability for serious harm to the marine environment

57. It was pointed out that liability should be established in accordance with annex III, article 22, of the Convention in regard to liability for "wrongful acts" committed in the course of the contractor's activities in the deep sea-bed area, and therefore a contractor should be held liable only when he committed a wrongful act. However, this did not resolve the question of liability for environmental harm which might arise even when the contractor had fulfilled all his responsibilities under the contract.

58. It was also pointed out that article 22 of annex III went beyond the scope of this article because it dealt with all third-party damage, not only that affecting the environment. The liability covered in this article related to actions resulting in damage to the environment, whether or not the activities could be considered wrongful. Furthermore the environment could not be considered a third party in the same sense as a person or corporation which might suffer damages or losses.

IV. PROGRAMME OF WORK AT FUTURE SESSIONS

59. During the 1991 spring session at Kingston the Special Commission should complete its first reading of document LOS/PCN/SCN.3/WP.6/Add.5. The Secretariat has advised that two new working papers dealing with accounting principles and accommodation of other activities in the Area are in the final stages of preparation. Those two working papers will be circulated to delegations well in advance of the Kingston session so that delegations may be prepared to discuss them during the session.

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Ninth session
Kingston, Jamaica
25 February-22 March 1991

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. Organization of Work

1. During the 1991 spring session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 3 held 12 meetings, i.e. the 131st to the 142nd meeting.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 Matters utilized some of the time allocated to meetings of Special Commission 3 for co-ordination purposes.

3. During the session the Special Commission resumed its consideration of document LOS/PCN/SCN.3/WP.6/Add.5, part VIII of the Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area: Protection and preservation of the marine environment in the Area. The Special Commission concluded the first reading of the articles not discussed during the 1990 resumed summer session in New York. The Special Commission then began consideration of document LOS/PCN/SCN.3/WP.6/Add.6, part IX of the draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area: Accommodation of activities in the Area and in the marine environment. After completing the first reading of this document the Special Commission met as a drafting group to expedite the task of achieving a revised version of the working paper.

4. When the Special Commission began its work during this session it met under the chairmanship of Mr. Carlos Bernal, Vice-Chairman from Mexico. I was elected chairman of Special Commission 3 on 11 March 1991 commencing as of the 137th meeting of the Special Commission.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

5. The Special Commission commenced its work by discussing the six remaining draft regulations contained in document LOS/PCN/SCN.3/WP.6/Add.5.

Article 123, Penalties

6, A proposal was made to add a paragraph to the draft article to provide that all sanctions or penalties will be proportionate to the violation. A request was also made that the phrase "fundamental terms of the contract" be further clarified and in this context it was suggested that the phrase may not be necessary since the regulations should also cover violations which were not fundamental. A further suggestion was that the difference between the consequences of "suspension" and "termination" should also be clarified.

Article 124. Monitoring programme of the Authority

7. It was pointed out that there was a need to define specifics about the monitoring programme i.e. who will do the monitoring, who would pay for it and who would evaluate the results. It was proposed that the functions concerned could be carried out by a team of inspectors or by another mechanism concerned with the collection of broader information in the Area. Another proposal was to involve specialized agencies with competence in such matters e.g. the International Maritime Organization (IMO) which has long experience in monitoring activities. It was also suggested that while a monitoring programme was needed, it should monitor all effects of all activities and not only the situation after pollution had already occurred. On the other hand it was pointed out that if this was done it would broaden the scope of the monitoring programme rather than focus it on pollution risks. It was noted further that any mining activity would impact on the environment in some ways but may not always entail a pollution risk.

8. A question was raised as to how the Legal and Technical Commission could decide whether the regulations were "adequate" and whether the Council was obliged to have recommendations submitted to it by the Legal and Technical Commission. It was pointed out that since the Council was empowered under Article 165, paragraph 2 (g) of the United Nations Convention on the Law of the Se to review regulations from "time to time" and to recommend amendments, the draft mining code should not empower the Legal and Technical Commission to ensure that regulations were "adequate". It was proposed that the Legal and Technical Commission should only be charged with ensuring that these regulations were complied with. It was also proposed that it would be up to the Legal and Technical Commission to update relevant information that would be submitted to the Council regarding the adequacy of the regulations.

9. It was also suggested that all the regulations were subsumed under the general obligation of states to protect the marine environment and that serious harm to the marine environment might result from sources other than pollution. It was suggested therefore that the wording of this Article be brought in line with the wording of Article 165 of the United Nations Convention on the Law of the Sea.

Article 125 Data not to be deemed proprietary

10. It was recommended that methods of analysis and monitoring should also be excluded from data considered to be non-propreitary.

Article 126 Application of these regulations to the Enterprise

11. It was proposed that the definition of the term "regulations" should be included in Article 2 on the use of terms so that it would be clear that the term encompasses "rules" and "procedures". It was also pointed out by some delegations that they understood the text to be a set of draft "regulations" in which "rules and procedures" were included. Other delegations however did not support this understanding. Several proposals were also made regarding the term "mutatis mutandis". One proposal suggested to change the term to "in toto". Another proposal was to change the wording in order to clarify that any rules relating to contractors would also be applied to the Enterprise.

12. It was pointed out that it was necessary to define the responsibility of States since the sponsoring State would be held liable for failure of contractors under their jurisdiction to adhere to the draft regulations. Furthermore, States should be required to adopt appropriate legislation to ensure compliance by those under their sponsorship in that regard. On the other hand it was pointed out that any sponsoring State could not have the same obligations as the contractor because the State did not carry out activities in the Area.

Article 127 Rules, regulations and procedures concerning the protection and preservation of the marine environment

13. It was suggested that the Legal and Technical Commission should not be required to reexamine regulations but should only be concerned with their implementation. The role of experts was also considered too limited and it was proposed to include a separate article providing for regular consultations with them. However, it was pointed out that the regulations may have to be reviewed as necessary in light of experience gained through activities in the Area and therefore at this time no one could be certain to what extent the views of experts would be needed. It was recommended therefore that in this case the original wording of the draft article be retained.

14. Another proposal was that the Legal and Technical Commission be mandated to continuously monitor the "effectiveness of the environmental regulations" and that it was necessary to clarify that the regulations were designed to protect the marine environment from the "harmful effects" of activities in the Area.

Article 128 Disputes

15. Reservations were expressed about giving a party to a dispute the freedom of selecting the arbitration tribunal constituted in accordance with Annex VII of the Convention and it was suggested that it would be better for parties to a dispute be accorded the greatest freedom to choose the means of settlement including different methods for conciliation. On the other hand it was pointed out that the dispute settlement system specified in the article was in line

with the Convention and that the Special Commission should not seek to establish another system. A further point of view was that a dispute settlement provision may not be necessary in this part of the mining code since a general provision appeared elsewhere in the code.

16. After concluding its consideration of document LOS/PCN/SCN.3WP.6/Add.5, the Special Commission began a discussion of document LOS/PCN/SCN.3/WP.6/Add.6. The document was introduced by the Special Representative of the Secretary-General for the Law of the Sea, after which the Special Commission then began a preliminary exchange of views. Among the views expressed were: that in the process of applying standards, for dealing with offshore installations within national jurisdiction, to activities taking place in the Area and outside national jurisdiction, certain adjustments would have to be made; that the draft regulations in LOS/PCN/SCN.3WP.6/Add.6 were all based on the premise that all activities should be accommodated as long as they did not interfere with other activities; that while it was important to promote the principle of "reasonable regard", some priorities may have to be determined; and that the role of the competent international organization be more clearly defined. The Special Commission then embarked on an article by article examination of the working paper.

Article 1 Scope of these regulations

17. It was proposed that "activities" in the Area in the present text should be taken to mean "mining activities" in the Area.

Article 2 Use of terms

18. When dealing with the term "installation" it was stressed that the difference between fixed or stationary installations on one hand, and mobile installations on the other, must be made. Doubts were also expressed whether there was a need to include "artificial islands" in the definition, although this doubt was not shared by other delegations.

Article 129 Reasonable regard for other activities

19. It as queried whether those conducting other activities such as fishing, marine scientific research and navigation should exercise the same degree of regard for sea-bed mining activities and whether this raised the question of setting priorities. It was pointed out that where there were conflicting interests among parties operating in international waters, Articles 87 and 112 of the Convention accorded the freedoms of the high seas to all States as well as the right to lay submarine cables and pipelines on the sea-bed beyond the continental shelf.

20. However it was argued that the Preparatory Commission was only mandated to deal with activities in the Area and not with other activities conducted on the high seas. Consequently the Preparatory Commission did not have the authority to set priorities but only to reduce the need for taking such decisions. It was suggested therefore that when the Convention came into force it would provide a dispute settlement mechanism that may facilitate the setting up of priorities for certain activities in the Area.

Article 130 Erection and emplacement of installations

21. A point of view was expressed that in prohibiting the establishment of installations where they might interfere with important sea lanes or intense fishing activity, a priority had been implied. It was then argued that within the Area any priority should in fact be given to sea-bed mining activities. However it was pointed out by others that one important economic activity e.g. sea-bed mining should not impede other equally important economic activities.

22. Another suggestion was that since major sea lanes and areas of intense fishing activity were well known and since there were areas where there was little fishing activity but extensive sea-bed mining was envisaged, such as the Clarion Clipperton Zone in the Pacific, there did not exist a strong possibility for conflict. Although in such cases there was no need to establish priorities, nevertheless a conflict resolution mechanism was required to settle any possible problems.

23. It was pointed out that the term "reasonable regard" was vague and there was a need to include a definition of the term "reasonable" in article 2 on the use of terms.

24. Some delegations questioned the need to retain paragraph 4 which dealt with the status of "artificial islands". However other delegations favoured its retention since it had implications on the status of natural islands.

Article 131 Identification

25. The point was made that while the International Maritime Organization (IMO) had established standards and norms for the identification of vessels, no such standards exist for structures to be used in sea-bed mining activities. In order to ensure safety, there was a need to establish such standards but it was suggested that the question, as to which competent international organization should establish these standards, be left open for now since several international organizations may be involved in this matter in the future.

26. Another view was put forward questioning whether permanence was the key criterion for giving warning for the presence of installations. It was suggested that it may be better to require "adequate" or "sufficient" warning, since a permanent but inadequate warning would not be desirable.

Article 132 Safety zones

27. It was proposed that since buoys used for marking safety zones in the Area would not be fixed they would not be effective and it was suggested to delete references to buoys. However other delegations preferred the retention of the reference since the specifications of the buoys would conform with standards established by the competent international organization.

28. It was felt by some delegations that there would be difficulty in establishing safety zones around mobile installations and it was proposed that the identification of a broad area of activity in which a mobile installation was operating would be sufficient.

29. A further proposal advocated the deletion of the reference to a safety zone not exceeding a distance of 500 metres because, it was argued, that a broader area may be necessary and therefore it may not be advisable to stipulate a specific measurement. Other delegations were of the opinion that the 500 metres figure should be retained but greater clarification be included as to the exact point of measurement or possibly the creation of a 500 metre safety belt around the zone of activity.

Article 133 Notice

30. It was suggested that notification by an entity other than the contractor or the Enterprise might be required and therefore there may be a need to designate a more central agency such as the International Maritime Organization (IMO) or the Authority to give notification to mariners, ocean charting services and other interested parties. It was also recommended that notice be given regarding the duration of the mining operation. On the other hand it was proposed that it would only be necessary to inform appropriate hydrographic services, since mariners received such notices through these services.

31. Several statements were made on the role of the sponsoring State in providing notification and whether notification should be required to be given in accordance with generally accepted international standards. Another view expressed was that more specificity was required other than the notion that notification be "sufficiently in advance", while a different view was that this notion was adequate.

Article 134 Removal of installations

32. It was pointed out that in the removal of installations, priority consideration would have to be given to navigational safety, fishing interests and environmental protection and it would be necessary to consult with competent international organizations such as the International Maritime Organization (IMO, the United Nations Environmental Programme (UNEP) and the Food and Agriculture Organization (FAO). The criteria established by the London Dumping Convention may also be relevant in the removal of such installations.

33. Several recommendations were made for preparing mandatory norms for the removal of installations used in sea-bed mining. Among the recommendations were: time limits should be set for the removal of disused installations; a minimum depth of unobstructed water column should be required in the case of the partial removal of an installation; rules for removing installations should be made parallel to those used in land-based mining, where the operator was responsible for safety even after the mine had ceased operations; reference should be made to the standards set in Part XI of the Convention especially in regard to installations not completely removed and clear reasons for only partial removal should be given.

34. Several delegations favoured specifying who would be required to remove installations that had fallen into disuse and in this context it was suggested that whoever erects and emplaces the installations should be responsible for their removal.

35. Another point of view raised by several delegations was that fixed installations projecting downward to the abyssal depths would not be

practicable and most installations used for activities in the Area would be mobile installations. Other delegations felt that this issue could not be decided at present since the advancement in technology could not rule out any possibility.

36. Other delegations felt that the text should be altered to be more relevant to sea-bed mining. Rather than set flexible guidelines the Special Commission should prepare mandatory regulations since that was what the Convention had envisaged. Further, it should be no problem for the Authority giving mandatory status to guidelines recommended by other competent international organizations. It was also suggested that a reserve fund be established to deal with difficulties that might arise in removing disused installations.

37. On the other hand it was pointed out that there may be difficulty in adopting guidelines, designed for application in activities on the continental shelf, for use in sea-bed activities in the Area owing to the present lack of knowledge of sea-bed mining technology to be used in the future.

38. A further proposal was the addition of a new article to provide for the Authority to exercise its right to inspect all installations in the Area as well as to ensure compliance with the relevant regulations and the imposition of sanctions in the case of non-compliance. The view was also expressed that this proposal could be considered at a later date when the part of the draft regulations on inspection and supervision of activities in the Area is taken up.

Article 135 Conduct of activities

39. It was pointed out that the title of the article was incorrect since it did not deal with its subject, namely, procedures for dealing with non-compliance. In this context it was suggested that before ordering the contractor to cease operations, steps should be taken to investigate the problem and to seek alternative solutions.

40. The issue was raised that the article in some respects went beyond the scope of the Convention as well as the powers of the Authority. For example, it gave powers reserved under the Convention for the Council and the Legal and Technical Commission to the Secretary-General of the Authority, whose role was supposed to be administrative.

41. Another point of view was that the article added the necessary elements to the mechanism designed to ensure that contractors should have "reasonable regard" for other marine activities in the Area. It was suggested that from the perspective of those making other use of the oceans, sea-bed mining was seen as the combined responsibility of the contractor and the Authority. Further, in cases where other activities were interfering with sea-bed mining the Secretary-General of the Authority could do no more than seek a solution in consultation with international organizations with the necessary competence for the activities concerned.

42. Several proposals were made regarding the role of the Secretary-General of the Authority. It was suggested, inter alia, that his role should be clearly specified especially if he were to intervene in matters falling within the competence of other international organizations; that the Secretary-General would have to be authorized by the Council to take certain steps; that the

regulations could require that the notification be addressed to the Authority rather than the Secretary-General; and that the Secretary General would have to obtain sufficient information concerning other marine activities to be in a position to inform those engaged in mining about these other activities.

43. The possibility was raised that where permanently disused installations might conflict with other marine interests, the question of liability for damages would have to be addressed. It was noted that it was important to determine whether a contractor or the Enterprise was financially capable of assuming responsibility for damages they had caused since the Authority should not be burdened with that responsibility.

44. Regarding notification of non-compliance it was suggested that the notification be required to be more specific. On the other hand it was argued that the decision to take action in cases of non-compliance as presently formulated in the draft regulations was beyond the competence of the Secretary-General.

Article 136 Consultation and co-operation with other international organizations

45. The point was made that the consultation and co-operation envisaged in the draft regulations had already been provided for in Article 169 of the Law of the Sea Convention and thus this article may not be necessary. On the other hand it was pointed out that the Convention had called for consultation, not co-operation, with other agencies and organizations concerned.

46. Another point of view was that this article as drafted was overly restrictive and may exclude the International Maritime Organization (IMO), the major agency with which co-operation was envisaged. It was also proposed that mention should be made of the need of supplementing and co-ordinating all regulations among ocean users.

III. PROGRAMME OF WORK AT FUTURE SESSIONS

47. During the summer 1991 resumed session at New York the Special Commission is expected to commence its consideration of document LOS/PCN/SCN.3/WP.6/Add.7, Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, Part X - Accounting Principles and Procedure. Any additional working papers if prepared by the Secretariat at that time would also be available to the Special Commission.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. Organization of work

1. During the 1991 summer session of the Preparatory Commission, Special Commission 3 held nine meetings, i.e., the 143rd to the 151st meeting.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 Matters utilized some of the time allocated to meetings of Special Commission 3 for coordination purposes.

3. At the first meeting of the current session Special Commission 3 commenced its consideration of document LOS/PCN/SCN.3/WP.6/Add.7, part X of the draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area: Accounting Principles and Procedure. To assist the Special Commission in its consideration of the working paper the Secretariat also had prepared a detailed commentary, contained in document LOS/PCN/1991/CRP.12 on the draft articles of the working paper.

4. It had been proposed at the previous session that it would assist consideration of the working paper if a seminar were held at the onset of the current session at which accounting experts from Governments and intergovernmental organizations could address delegates. Since those experts were not available the seminar was cancelled.

5. At the first meeting of the Special Commission during the current session, the Special Representative of the Secretary-General introduced the working paper. He stated that the draft regulations on accounting procedures had been based on procedures used by several of the largest petroleum companies engaged in petroleum production in Africa, Asia and South America,

as well as a model set of rules prepared in 1981 by the United Nations Centre on Transnational Corporations (UNCTC). The draft attempted to balance uniformity with flexibility so that each contractor could establish its own system, subject to approval by the Authority. That would allow their accounting procedures to fit their operations and be consistent with independent auditing and applicable national laws.

6. The Special Representative of the Secretary-General also stated that the draft regulations were consistent with the conclusions of the Centre on Transnational Corporations and with the International Accounting Standards of the International Accounting Committee which had member bodies in over 70 countries. The draft regulations apply both to the Enterprise and to the contractors.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

7. After the introduction by the Special Representative of the Secretary-General, the Special Commission commenced its consideration of the working paper with a general exchange of views in the context of a first formal reading. The Special Commission then entered a second phase of consideration of the paper, meeting as an informal working group of the whole. During this phase extensive comments and proposals were made regarding the purpose, scope and provisions of the draft regulations and, rather than their being repeated here, delegations are referred to documents LOS/PCN/SCN.3/1991/CRP.13 and LOS/PCN/SCN.3/1991/CRP.14, which reflect in detail the views expressed by several delegations.

8. The following suggestions were made in an article-by-article discussion of the working paper.

Article 2. Use of terms

9. The view was expressed that the definition of an "Accounting Manual" contained in the article responded more to the needs of a comprehensive accounting system than to those of the type of reporting system contained in the Convention. Another suggestion was to add a new paragraph 4 which would provide that "for the purposes of this Part, 'significant gain or loss' means any total inventory adjustment exceeding a percentage of the total of physical assets or of inventory before adjustment as shall be agreed upon between the Authority and the contractor, in conformity with generally recognized accounting principles."

Article 137. Scope of this Part

10. It was pointed out that Annex III, article 17 (1) (c) (i) did not define the scope and that it had in fact been defined in Annex III, article 13. Furthermore, those accounting procedures should only apply to contractors who had opted for the mixed system, i.e., a combination of a production charge and a share of net proceeds. Another view expressed was that the scope was

limited only to activities under the contract and should be supplemented by additional wording to include financial transactions relating to expenditures incurred prior to commencement of commercial production and which were directly related to the development of the productive capacity of the area covered by the contract and the activities related thereto for operations under the contract.

Article 138. Accounting principles

11. It was pointed out that the draft rules confused accounting regulations and management principles. It was important that accounting principles should be sound; the term "reasonableness of costs" might be acceptable to some but was considered subjective by others and would prove difficult to interpret. The question was raised as to the extent to which the Authority would exercise influence on the management role of the contractor. It was pointed out in that context that it was important not to replace the judgement of miners and contractors with that of civil servants of the Authority. It was therefore proposed that the first paragraph should be deleted and that the article should specify that the accounting should be complete, clear and easy to understand.

12. In support of that argument it was pointed out that the test of reasonableness was not a matter for external bodies. It would be impossible to formulate criteria for reasonableness, and accounting matters were of a factual and not of a subjective nature.

Article 139. Currencies

13. The view was expressed that the article generally reflected current trading practices but as future conditions were unknown it might be better to retain some flexibility as to the choice of currency.

14. It was also proposed that the period in question should be specified so as to avoid gains and losses resulting from transactions. In that regard it was proposed to amend the draft article and to substitute "when payment was made" by "when payment is due" for determining the calculations for gains and losses.

15. On the other hand, it was maintained that the draft regulations were dealing with facts which related to the day "when payment is made" and that the notion of "when the payment is due" should not be introduced in the draft regulations.

Article 140. Accounts and manuals

16. It was proposed to amend the text so that the contractor would not be required to submit the Accounting Manual with other documents. The amendment should further refer to a comprehensive chart of accounts and related account definitions consistent with the Accounting Manual submitted by each contractor for approval by the Authority. It was pointed out that it was important that

the accounts be consistent with non-discriminatory accounting procedures while the harmonization of revenue and the principle of non-discrimination would serve both the interests of the Authority and those of the contractor.

17. Another view expressed was that, although the contractor would be obliged to submit the Accounting Manual for approval within 60 days of the effective date of the contract to the Authority, subsequent articles contained no time-frame within which the Authority should respond. To remedy this omission it was proposed that if the Authority did not state its views on the documents within 60 days of the date of their submission they would be considered approved.

18. Another issue raised was in regard to the keeping of books at each contractor's principal place of business. Views were expressed that the language of the draft article would give rise to varying interpretations and it was suggested that the language be modified to avoid such interpretations.

Article 141. Accounting for materials and supplies

19. Several views were expressed on this article. It was stated that it would not be objective to fix percentages for the price of new and used material and that any references to percentages should be deleted, including the percentages used to define "significant gain or loss".

20. Another view was that the term "costs actually paid" should be changed to "costs actually charged".

21. A question was raised as to the need for categorizing the materials as new, used or that which could not be classified, and it was suggested that the price of the material could exceed its value and that the percentages contained in the draft regulations might prove to be too high. Another view was that the use of the term "if feasible" should be deleted and that rather than requesting "reasonable explanations" only "factual explanations" should be required.

Article 142. Accounting for equipment

22. It was suggested that a distinction should be made between "controllable materials" and "physical assets" and that a definition of "physical assets" might be required to be included in article 2 on the use of terms.

23. Another view was that the period of five years was considered long for the contractor to conduct a physical inventory of capitalized physical assets and that a shorter inventory period would be preferable.

24. A further view was that there was no need for the Authority to be involved in the preparation of a physical inventory since only an accountant was required for its preparation.

Article 143. Personnel costs

25. It was proposed that the term "net" should replace the word "gross" in regard to salaries to better reflect costs to the contractor. Furthermore, references to costs for holiday, vacation, sickness and disability payments should be preceded by the phrase "other costs directly incurred in operations under the contract such as ...".

26. A different view was that the term "gross" should be retained in regard to salaries. It was also pointed out that the percentage of taxation was of no relevance to the Authority.

Article 144. Charges for training programmes for personnel of the Authority and developing States

27. It was suggested that the draft article gave the impression that training would be provided free of charge by the contractor and that the Convention did not provide for such an arrangement. The suggestion was then made that if contractors were to provide any training it should be charged to the Authority.

28. A view was expressed that the article should provide for practical programmes for the training of personnel of the Authority or of developing States. It should also provide for the participation of developing States in all activities in the Area covered by the contract.

29. A further view was that "charges" were not defined in the Convention, which only provided for "principles", and that according to the Convention the contractor was required to include the participation of nationals of neighbouring developing States.

30. Another view was that the obligation to undertake measures to advance the domestic technology of developing countries included providing training opportunities. It was also pointed out that the expenses for such training should be deducted from the share of proceeds attributed to the Authority.

Article 145. Charges for transfer of data to the Authority

31. It was proposed that the draft article should be preceded by a new text establishing the obligation of the contractor to transfer technology. It was also suggested that the article should be amended to apply to all contractors and not just to those who had opted for the mixed system, i.e., the combination of a production charge and a share of net proceeds. The amendment proposed was that "costs for the transfer of technology by the contractor to the Enterprise in respect of the area covered by the contract shall be charged in the event the contractor is requested to acquire from the owner of the technology the legal right to transfer to the Enterprise any technology used by the contractor in carrying out activities in respect of the area covered by the contract which he is not otherwise legally entitled to transfer."

32. Another view was that the proposed amendment contained problems since the Convention called for the transfer of technology under "fair and reasonable

commercial terms and conditions" and if accepted the proposed amendment would contravene the provisions of the Convention in that regard.

33. On the other hand it was pointed out that this objection to the amendment viewed the transfer of technology from a commercial context. The proposed amendment did not concern itself with commercial exchange; it was only concerned with issues of deductible costs. If such costs were paid, this would be reflected under income and expenditures and not as a charge.

Article 146. Charges for third-party contracts

34. It was proposed to amend the article to reflect that the charges for comparable working services resulted from competitive bidding among potential suppliers. An additional new paragraph was proposed to provide that "the policies followed by the contractor with regard to determining the prices for transactions undertaken with any person, firm or company that, directly or indirectly, controls, is controlled by or is under the common control with a contractor shall be disclosed in the financial reports submitted by the contractor to the Authority".

35. It was pointed out however that the article should be limited to mentioning that third party costs should be charged since it is within the management's responsibility to decide on the actions necessary to ensure optimum revenues for the contractor and thus for the Authority.

Article 147. Charges for affiliates

36. The view was expressed that it was the obligation of each contractor to ensure optimum revenue for itself and to try to make better profits than competitors.

Article 148. Rental payments

37. The view was expressed that the draft article restricted the contractor's discretion with regard to interest to be paid by the contractor for development costs and for operating costs and thus it should be deleted. However, it was also suggested that the draft article be retained since it was possible for profits to be disguised as rental payments to the detriment of the Authority.

Article 149. Insurance costs and losses

38. It was pointed out that the second part of the article presented difficulties and that if losses occurred they should be charged, irrespective of the reason for their occurrence. Furthermore, no judgement of misconduct should be made. It was suggested that a contractor should also be entitled at any time to close down the project, and if he did so he should not be required to pay fees.

39. A different view was that it would seem strange that a contractor engaged in an act with predictable negative consequences would be allowed to profit

from his indiscretions. It was stressed that no person should take advantage of his mistakes or use them as a defence. It was proposed therefore that contractors would have to accept a measure of responsibility, particularly for wilful acts causing environmental damage, and should not be allowed to charge costs for any resulting clean-up.

Article 150. Legal costs

40. It was pointed out that the evaluation of legal costs could not be done by those outside of management and that any reference to "fairness and reasonableness" should be deleted. Furthermore, legal costs occurring prior to the effective date of the contract, but which were directly related to the operation of the contract, should be deductible. It was also stated that there was no need to authorize the Authority to examine the requirement for legal fees and that only the contractor should establish whether or not such a need existed. On the other hand it was pointed out that the text on legal costs should be re-examined since it referred to "fair and reasonable costs".

41. A view was also expressed that there was some merit for charging costs related to the contract if they had been incurred prior to its effective date. However, the discretion to decide as to whether legal costs arose from necessary, as opposed to unrelated, services should not be left to the contractor. It was claimed that if the article were deleted the contractor could charge all legal costs to the Authority.

Article 151. Overhead and administrative costs

42. It was proposed that the draft article be amended to state that overhead costs incurred after the effective date of the contract were to be charged in accordance with a specific percentage to be agreed upon between the Authority and the contractor. It was also proposed that "rates" referred to in the text should be specifically addressed as "agreed upon rates". In addition the term "wilful misconduct" should supplement references to "negligence". However, another view expressed was that the current wording of the draft article did not adequately differentiate between contractors choosing only a production charge and those who had chosen the mixed system. It was also proposed that the reference to "negligence" should be deleted.

43. A further view was that the amendments proposed contained an element of elasticity which would enable appropriate adjustments to be made. The amendments provided room for negotiations between the Authority and the contractor with respect to overhead costs incurred. However, another view was that there was no room for negotiations between the contractor and the Authority in most cases, and particularly in this article the contractor had no room at all for negotiations.

Article 154. Financial reports

44. It was proposed that the article should be clarified to include a text stating that "each quarterly report shall be prepared on a monthly and

aggregate basis and shall be sent to the Authority within 45 days after the end of each quarter. The Authority may make comments and propose adjustments to any report provided that such comments and proposed adjustments are made in writing within six months from the date of submission of a quarterly report". Another proposed amendment was in reference to the annual report, and it was proposed that the Authority "may make comments and propose adjustments provided that such comments and proposed adjustments are made in writing within five years from the date of submission of the report".

45. On the other hand it was pointed out that the draft article could be characterized as falling into the realm of over-regulation and contained excessively onerous provisions. For instance, the necessity of quarterly reports had not been demonstrated and annual reports should suffice. The use of a profit-and-loss statement might seem appropriate but the same did not apply to the statement of cash flow and other provisions. Furthermore, the projected budget statement would also be inappropriate since much of it would be confidential. It was proposed that the provision for five years for comment by the Authority was too long and should be replaced by a provision for one year.

Article 155. Inspection and audit

46. A proposal was made that the text should specify that an annual audit should be undertaken by reputable and independent auditors at the expense of the contractor. The Authority, at its own expense, should be able to designate reputable and independent accountants to conduct additional audits if special circumstances should warrant it. It was also proposed that an extra audit be carried out, at the contractor's cost and at the request of the Authority, if the contractor's reports had been found to be inaccurate or incomplete. Furthermore, the accountants designated by the Authority should have the right to conduct inspections in connection with the contract.

47. A different view expressed was that the audit should be conducted by recognized auditors in accordance with internationally recognized auditing standards.

48. It was pointed out, however, that there was no justification for the right of accountants to conduct inspections and that this provision was excessive in that regard and should be deleted. In the event this right was retained, then all inspections should be limited to those sites directly used by the contractor.

Article 156. Retention of books, records and documents

49. It was proposed that the text should be amended to provide that all books, records and documents shall be maintained for a period commensurate with the useful life of the equipment and material used by the contractor and, in any event, for not less than seven years from the date of issue. However, it was pointed out that this amendment introduced a degree of uncertainty regarding the duration for which books and records must be maintained. It was

stressed that it was important to specify the exact length of the period required.

Article 157. Application of these regulations to the Enterprise

50. It was proposed that the phrase "mutatis mutandis" should be deleted since the Enterprise must conform to the reporting rules for net proceeds without exception. It was also pointed out that the Enterprise would need a comprehensive financial accounting system and its management might wish to choose among existing systems.

51. Following the completion of the consideration of LOS/PCN/SCN.3/WP.6/Add.7 in the informal working group of the whole, the Chairman conducted informal open-ended consultations to ascertain areas of agreement and disagreement on the paper.

52. There was general agreement amongst delegations that it would be necessary to ensure through these regulations that the International Seabed Authority gained the financial benefits to which it was entitled under the relevant provisions of the Law of the Sea Convention. There was less unanimity as to the precise scope and structure of a revised version of LOS/PCN/SCN.3/WP.6/Add.7. Several delegates expressed the view that they were not in a position at the current stage to put forward concrete drafting proposals, as such proposals would require advice from experts from their home capitals.

53. Delegates therefore proposed that the Chairman undertake the task of preparing a revised version of the working paper. He intends to do this after receipt of concrete proposals from all interested delegations and after further consultations and discussions with delegations during the coming session. In this context, certain delegations which have not yet put forward concrete drafting proposals undertook to do so in the period before the spring session in 1992.

III. PROGRAMME OF WORK AT FUTURE SESSIONS

54. During the spring session in 1992 the Special Commission will conclude its consideration of document LOS/PCN/SCN.3/WP.6/Add.7 as quickly as possible. To this end the first week of the coming session will be devoted to intensive consideration of that working paper. The assistance of experts from capitals during the first week would be of utility for all delegates.

55. The Special Commission will then consider two new working papers to be prepared by the Secretariat on inspection and supervision of activities in the Area and on labour matters. Those documents will be circulated to delegations well before the commencement of the spring session so that they may prepare themselves for discussion.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. Organization of work

1. During the 1992 spring session of the Preparatory Commission, Special Commission 3 held 12 meetings, i.e., the 152nd to the 163rd meeting.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 matters utilized some of the time allocated to meetings of Special Commission 3 for coordination purposes.

3. At the first meeting of the current session, Special Commission 3 resumed its consideration of the document LOS/PCN/SCN.3/WP.6/Add.7 (Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, Addendum, PART X, Accounting Principles and Procedures). In view of the fact that the working paper had been extensively discussed during the 1991 summer session in New York and that amendments (document LOS/PCN/SCN.3/WP.15) as well as comments (LOS/PCN/SCN.3/1991/CRP.13 and LOS/PCN/SCN.3/1991/CRP.14) had been suggested by certain interest groups, it was decided that instead of another article-by-article examination of the working paper, the Special Commission should hold informal consultations, with the aim of narrowing differences in positions.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

Informal Consultations on Accounting Principles and Procedures

4. The informal consultations provided delegations with an opportunity to listen and examine the views of others in a more relaxed and less structured setting. They were held in the course of five meetings of the Special Commission and delegations present were involved in detailed and exhaustive discussions. It was understood by several delegations that it was necessary to consider calculation of the production charge and the share of net proceeds in a unified context, as the production charge is an integral part of both payment options contained in Article 13 (4) of Annex III of the Law of the Sea Convention. At the same time it was agreed that it would be useful as an analytical tool to consider initially the question of the production charge in isolation. Two main views evolved from the discussion; on one hand it was felt that complicated and intricate accounting principles were not required

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especially if the contractor selected the production charge system of paying revenues to the Authority as provided for in Article 13 (5), Annex III of the Convention. It was pointed out that once the quantities of polymetallic nodules recovered the amounts of processed metals produced by the contractor were known, the production charge system would be simple enough to avoid the need for detailed examination of the contractor's accounting records.

5. The other view was that, while there were practical distinctions between both payment options as contained in Article 13, paragraph 4 of Annex III of the Convention, these distinctions should not be seen as exempting to some of the contractors from complying with accounting principles and procedures applicable to all contractors in a unified context. It was the felt that even if the choice was made to pay only the production charge it would not be sufficient to create a situation where the Authority would not be empowered to verify how the contractor determined the production charge he would be required to pay. It was further argued that the Authority in order to dispel any doubts on how the production charge was determined, would have access to all information that goes beyond the quantity of nodules and the average market price of processed metals, including as appropriate, information of a financial and accounting nature.

6. After several sessions of the consultations, an informal compromise proposal relating to calculation of the production charge was suggested. It provided for an arrangement between the contractor and the Authority immediately prior to commencement of commercial exploitation by which certain parameters relating to the quantities of processed metals to be produced in a given period and financial arrangements would be agreed upon. It was suggested that this would be a kind of confidence-building measure which would reduce the likelihood of the Authority needing to resort to a safeguard clause entailing an examination of the contractors' books.

7. Initially it appeared that this informal proposal may command a consensus among the delegations participating in the informal consultations. It was also the view of several delegations that certain procedures of an accounting nature should apply on a uniform basis to all contractors and not only on an exceptional basis as would be the case in the proposed "safeguard clause". It was stressed in this context that the Authority and the contractor must know, from the onset of their contractual relationship, what information would be required to settle any dispute, including information of a financial and accounting nature to be submitted by the contractor in close consultation with the Authority. However after some discussion certain reservations were still maintained especially in respect to the need of a "safeguard clause" which the Authority could invoke in situations where there were any discrepancies between the accounting of the contractor and that of the Authority. At this point it was felt that further discussion within the informal consultations or formal meetings of the Special Commission on the subject would not achieve a positive result. Delegations were then requested to continue discussions privately among themselves which could lead to a resolution of the matter. It is my intention to produce a revision of the working paper taking into account the views expressed by delegations.

Consideration of document LOS/PCN/SCN.3/WP.6/Add.8 and Add.8 Corr.1

8. At its 158th meeting, Special Commission 3 commenced the consideration of document LOS/PCN/SCN.3/WP.6/Add.8 and Add.8/Corr.1 (Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, Addendum, PART XI, Labour, Health and Safety Standards). Following the introduction by the Secretariat of the working paper, the members of the

Special Commission embarked on a general exchange of views.

9. During this general discussion several delegations questioned the necessity of draft labour, health and safety standards for deep seabed mining only at the present time. Some delegations were of the opinion that existing conventions such as those of the International Maritime Organization (IMO) and the International Labour Organisation (ILO), as well as national legislation on health and safety standards would cover activities in the Area and therefore the Special Commission did not have to duplicate those standards in the mining code.

10. Other delegations stressed that whilst existing standards were relevant, seabed mining would be a unique activity requiring new standards since existing ones were not appropriate in all cases.

11. The view was expressed that the concise and compact format of the working paper which represented "textual economy" should be preserved since it would form a valuable basis for discussion. Another view expressed was that the International Maritime Organization (IMO) had prepared a wide range of measures regarding the protection of life and ships at sea and that the experience of the IMO should be utilized by the Preparatory Commission while drafting labour, health and safety standards.

12. In this context it was pointed out that in article 158, paragraph 2 of the draft working paper, there was mention of consulting with "competent international organizations". Since there were many such organizations it would be necessary to mention all of them in the text if there is an attempt to name only a few. Another suggestion was to replace the term "competent" with the term "relevant".

13. Several delegations inquired as to the sources used by the Secretariat in drafting the working paper. It was pointed out by the Secretariat that the main source was the provisions of the United Nations Convention on the Law of the Sea. Reference was also made to previous working papers prepared by Special Commission 3 as well as ILO conventions and national legislation dealing with petroleum exploration and drilling on the continental shelf.

14. The view was expressed that the key issue to be resolved was to what extent existing national and international norms were related to activities in the Area. It was suggested that all human activities in the Area would take place on board vessels which would be under the jurisdiction of States, i.e. the Flag State. Therefore, any norms would be applicable only to those vessels and not to the deep seabed itself. On the other hand, it was argued that there was a degree of competence of the Authority in regard to health and safety standards as provided for in the Convention. Since the mining code would be a self-contained instrument without prejudice to existing criteria and since there was a difference between activities conducted outside the Area, which were not subject to the supervision of the Authority, and those conducted inside the Area which would be subject to such supervision, this distinction should be explicitly stated in the working paper.

15. At the conclusion of the general exchange of views, the representative of the International Labour Organisation (ILO) made a statement relating to the working paper and the role of the ILO in establishing labour standards. The main points reflected in the statement were that:

i) it should be determined whether it was appropriate or necessary for the Authority to adopt rules and regulations on labour standards in

as much as these may already be provided for by international conventions.

ii) there existed a well-established body of provisions in the form of labour standards, many of which were binding on various member States of the ILO and included an entire corpus of labour standards applicable to seafarers. Under existing ILO conventions, States members on ratification undertook in accordance with Article 19, paragraph 5(d) of the ILO Constitution to give effect to the provisions of the conventions they had ratified. The substantive scope of each ILO convention depended on its terms; some applied to "all workers" or "all branches of economic activity" or were otherwise expressed to be completely general in scope. Others were limited to specific sectors, i.e. industry or even occupations such as dock work.

iii) there seemed to be no legal basis (except in the case of some maritime Conventions) on which it could be maintained that a State's obligations resulting from its ratification of a Convention extended to activities carried out by it or by its enterprises or by its nationals in the Area under a contract with the Authority.

iv) activities in the Area would be carried out beyond the limits of national jurisdiction and were not governed by national law but by the relevant provisions of the United Nations Convention on the Law of the Sea and by whatever rules and regulations were adopted by the Authority. Therefore in the absence of such special provisions a State would be under no obligation to ensure that its enterprises or nationals respected conventions ratified by it while carrying out activities in the Area.

v) the application of maritime labour conventions which have been adopted by the ILO were limited to seagoing ships or ships engaged in maritime navigation and were registered in the territory of a ratifying State. Furthermore, the provisions of these conventions applied only to seafarers.

vi) with regards to the legal status of workers engaged in activities in the Area the question arose as to whether they would be considered industrial workers or seafarers. If they were not considered seafarers then ILO maritime conventions would not apply to them. Since it was the concern of the ILO to ensure that workers in the Area were guaranteed adequate protection in the social and labour fields and that labour and social conditions would be maintained at an appropriate level the ILO considered that the approach in document LOS/PCN/SCN.3/WP.6/Add.8 contained an appropriate basis for discussion.

vii) the ILO would be happy to assist and advise the International Seabed Authority in the adoption of rules and regulations on labour standards, since the ILO could draw from its long experience in labour matters and from the international labour standards adopted under its auspices.

Article-by-article discussion of document LOS/PCN/SCN.3/WP.6/Add.8 and Add.8/Corr.1

Article 1 (Scope of these regulations)

16. The view was expressed that the scope of this article should be limited to persons involved in activities in the Area and not to the activities themselves and that article 94 of the Convention relating to the duties of the Flag State would be applicable to the workers on board vessels operating in the Area.

17. Another view expressed was that the nature of activities in the Area differed from those of the high seas and that new regulations and standards were needed for seabed mining. Since ILO Conventions were only applicable to seafarers, existing standards might not be sufficient to protect workers engaged in activities in the Area.

Article 158 (Protection of workers)

18. It was suggested that matters such as labour relations, social security and employment security were beyond the scope of the rules and regulations of the Authority and this article should provide for the safety of workers and the protection of health of workers. Also it was suggested that the phrase "in accordance with the rules and regulations and procedures of the Authority" of paragraph 1 and the whole text of paragraph 2 should be deleted.

19. A counter view was that the article was properly worded and its general language was correct in establishing the standards to be applied for the protection of workers engaged in activities in the Area.

20. It was also pointed out that since there were gaps in the application of labour standards in the Area, the Authority should not elaborate new rules but rather utilize the provisions from existing international conventions.

21. It was then proposed that a text should be inserted which would provide that each contract or involved in carrying out activities in the Area should observe internationally recognized standards as specified in the conventions and recommendations adopted by the ILO. In order to assist the contractors, the Council should establish a list of relevant conventions and recommendations in consultation with the ILO.

22. On the other hand it was suggested that existing international norms may not be appropriate in relation to activities in the Area and in the absence of such provisions new norms and standards would have to be devised.

Article 159 (Discrimination)

23. It was proposed to delete this article since it went beyond the scope of the rules and regulations of the Authority. Another view was that in particular situations such as this there was a need to re-state certain norms of international law and as such this article should be maintained.

24. It was pointed out that the words "equality of opportunity" may create a problem where a State, if it does not employ nationals of other States, may be accused of discrimination. However, it was suggested that discrimination in the context of this article was not only limited to national origin, but also to sex, race, religion and other factors.

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Article 160 (Safety of life at sea)

25. A query was raised that questioned the Authority's competence to draft rules regarding this matter. It was maintained that the rules of the International Maritime Organization (IMO) should apply in the Area and that this article should be amended to provide that each contractor should comply with applicable rules and regulations of the IMO concerning the safety of life at sea. In order to assist contractors, the Council should establish a list of rules and regulations of the IMO in consultation with that organization.

26. It was pointed out however that the drafters of the Convention had foreseen, as reflected in article 146 of the Convention, that there would be a need to supplement existing international law with new rules and regulations. It was therefore necessary to go beyond the existing rules of the IMO.

27. It was suggested that as the term "installation" should be defined to include vessels, being covered by the provisions of article 161 and that paragraph 2 of this article was superfluous. It was also suggested that sub-paragraphs (a) and (b) of this paragraph were not fully covered by the applicable international conventions.

Article 161 (Safety of installations)

28. It was pointed out that although the text of the article was generally acceptable it should include the protection of the marine environment which, although not directly related to the safety of human life, warranted attention. However, another view was that the issue of the protection of the marine environment had been covered elsewhere in the mining code and did not require repetition in this article. It was also proposed to replace the phrase "fire-fighting" with the phrase "disaster response".

Article 162 (Safety of contingency plans)

29. It was suggested that the obligations of contractors were already dealt with in article 161 (Safety of installations) and therefore reference to certificates in paragraph 3 should be deleted. Furthermore, it was proposed that paragraphs 3 and 4 of the article was superfluous and should be deleted in their entirety. A counter view was that these two paragraphs were not superfluous since they were concerned with the safety of human life and should therefore be retained. It was proposed that the term "prompt" in paragraph 1(c) should be amended to read "immediate" in order to reflect adequately the urgency of the situation.

Article 163 (Annual reports)

30. It was pointed out that annual reports should only concern the safety of life and the conditions of work and that any reference to disputes and complaints should be deleted. Furthermore, it was suggested that annual reports would be redundant since contractors were required to submit reports on each incident separately.

31. Another view expressed was that if annual reports were not submitted it would affect the Authority's responsibility to supervise and control the issues which would be the subject of the annual reports.

Article 164 (Reports of serious harm)

32. It was proposed that the scope of this article seemed too narrow as it only concerned the safety of human life and it should therefore be expanded to include the safety of installations which was directly linked to that of human life. On the other hand it was pointed out that if this proposal would be accepted it would require additional texts covering serious incidents which might have repercussions for navigation. Another view was that if the issue of installations was added in this article, it would confuse the situation. It was stressed that the safety of human life was paramount and that the focus of the article must be limited and there was no need to include other extraneous issues.

Article 165 (Emergency orders)

33. It was pointed out that both article 164 (Reports of serious harm) and this article sought to be preventive and that although this preventive approach was useful a curative one would also be desirable. It was proposed that the text should be amended and should cover not only emergencies that may occur but also those that had already occurred. It should also provide that the Secretary-General, at his own discretion or at the request of the contractor or persons concerned, should initiate a formal inquiry as to the causes and circumstances surrounding any fatality or near-fatality. It was further proposed that the Authority should provide that, the Council should act on the findings of the inquiry which should be arrived at without prejudice to national proceedings and should be made available to all concerned. The new text should also provide that pending action by the Council, the Secretary-General may take reasonable and practical interim measures to protect human life.

34. A question was raised regarding this proposed new text as to what would be the extent of the interim measures and whether they included or implied administrative measures. Furthermore, it was stated that the text in the article relating to reasonableness and practicality required elaboration and that more specificity was needed regarding the measures the Secretary-General could take.

Article 166 (Inspectors)

35. It was suggested that the text of the article did not clearly define the role of the Council and of the Legal and Technical Commission. It was pointed out that under the terms of Article 162 of the Convention it was up to the Council to oversee activities in the Area and that the role of the Secretary-General was only an administrative one.

36. Another view was expressed that the role of inspectors was generally to investigate. However according to the text of the article, inspectors would engage only in monitoring, which would be too passive a role. It was therefore proposed that the term "monitor" should be replaced by the term "inquire into" in order to clarify the inspector's task. In this context it was also proposed that contractors be required to assist and cooperate with inspectors who should have access to all relevant records.

37. A different view was that labour matters were beyond the scope of the rules and regulations of the Authority and the text of the article should be amended accordingly. There was also a proposal that all references to inspectors found in separate parts of the mining code should be included in one chapter and that its wording should be general so as to cover various situations.

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38. At the end of the article-by-article discussion of working paper document LOS/PCN/SCN.3/WP.6/Add.8 and Add.8/Corr.1 the Special commission held two sessions of informal consultations during which concrete drafting suggestions were made by delegations. As with document LOS/PCN/SCN.3./WP.6/Add.7 it is my intention to prepare a revision of this working paper taking into account the views of delegations.

III. FUTURE PROGRAMME OF WORK

39. I intend to prepare revisions of the two working papers referred to above during the inter-sessional period prior to the August meeting in New York. The completion of revisions of these two papers will mark the conclusion of the formal examination of all parts of the draft deep seabed mining code which forms the mandate of Special Commission 3. Following completion of the revisions, I intend to prepare and make available the draft final report of Special Commission 3 prior to the commencement of the August session. The programme of work for Special Commission 3 at the Tenth Resumed Session will therefore consist of consideration of the draft final report. It is my intention to conclude consideration by Special Commission 3 of the draft final report at that session.

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New York, 10 August-21 August 1992

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1992 summer session of the Preparatory Commission, Special Commission 3 held four meetings, i.e. the 164th to the 167th meetings. The Special Commission also held several sessions of informal consultations on the revision of the documents on Labour, Health and Safety Standards.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 matters utilized some of the time allocated to meetings of Special Commission 3 for coordination purposes.

II. ISSUES DEALT WITH IN THE SPECIAL COMMISSION

Informal consultations

3. The Special Commission held informal consultations for the purpose of revising documents LOS/PCN/SCN.3/WP.6/Add.8 and LOS/PCN/SCN.3/WP.6/Add.8/Corr.1 (Labour, Health and Safety Standards). Following a preliminary exchange of views and informal consultations during the 1992 spring session of Special Commission 3 in Kingston, Jamaica, document LOS/PCN/SCN.3/1992/CRP.16 was prepared taking into account views expressed during those discussions. That document was then discussed during the informal consultations during this session.

4. The informal consultations were able to achieve a text that was agreeable to all the delegations that participated in the consultations. Once this text receives the endorsement of the Special Commission it will be issued as

document LOS/PCN/SCN.3/WP.6/Add.8/Rev.1. I wish to express my sincere gratitude to all the delegations involved in negotiating this text and to the representatives of the International Labour Organisation (ILO) for their advice and assistance in this matter.

Potential environmental effects of deep seabed mining

5. Two experts from Germany addressed the Special Commission and discussed the current status of research on the environmental impact of deep seabed mining of polymetallic nodules as well as requirements for future environmental impact studies.

6. One of the experts suggested that mining impacts could be divided into two categories: those which were avoidable and those which were not. Expected impacts included those resulting from a sediment cloud or plume created by collector activity which would blanket the seabed and the animals thriving on and in the sediment. He proposed that the disposal of fine particulate material and of all organic wastes pumped up with the nodules should not take place in surface waters; they should be discharged at greater depths to avoid the contamination of the productive surface zone.

7. The expert said that Governments and industries had long recognized the potential environmental hazards arising from exploration activities and that environmental investigations had accompanied early research into deep seabed mining activities, such as those conducted in 1970 by the United States company, Deep Sea Ventures. Germany had initiated intensive environmental studies along with mining tests in the Red Sea. Despite such attention to environmental concerns, he felt that it was difficult for industrial development and environmental precaution to be in tune. He was of the opinion that engineers could design mining equipment but oceanographers were unable to predict the extent to which the marine environment could be harmed since knowledge of the ecology of the deep ocean was limited. He felt that the prediction of mining impacts was rendered more difficult due to the small scale of oceanographic sampling as compared to the huge scale of potential mining activities.

8. The expert suggested that impact predictions could not be deduced from current knowledge and that it was necessary for oceanographers to conduct large-scale investigations. He pointed out that scientists had recently initiated the first large-scale benthic impact observation experiment, involving the creation of a simulated disturbance on the sea floor to determine the reaction of deep sea marine life to mining impacts. He informed the Special Commission that scientists from the United States and the Russian Federation were launching a second large-scale experiment.

9. He said that such experiments did not suffice in the provision of information; only a pilot mining operation would provide the opportunity to evaluate risks. He suggested that a pilot mining operation would mine the seabed on a reduced technical scale for four to six months. He felt that the impacts of the pilot operation would not harm the ocean but the scale of

activities would be sufficient to allow extrapolation of observations elucidating environmental impacts. In his opinion such a pilot project required close cooperation between ocean miners and those interested in protecting the marine environment.

10. The expert also felt that international cooperation was essential to risk assessment since pilot mining operations would require environmental studies before, during and after the mining tests. He pointed out that several research ships would need to operate for approximately two years at a cost of about US$ 40 million. Other risk assessment activities, such as data evaluation, would cost an additional US$ 50 million. There was further need for international cooperation since such funding could not be provided by a single country and the knowledge gained from such tests could be shared among all interested parties. He suggested that cooperation could be achieved on two tiers: between oceanographers and miners and among different countries. It was critical, he said, for politicians, industrialists, engineers and oceanographers to arrive at a common understanding.

11. He announced the convening of a symposium on deep sea ecology and deep sea mining in Hamburg in May 1994 to address such issues as environmental problems associated with deep sea mining; coordination of pilot operations between miners and oceanographers; long-term monitoring of mining impacts; and the further promotion of international and interdisciplinary cooperation in mining-related oceanography. He felt that a system of communication between groups interested in deep sea mining should be established. He pointed out that such a system already existed in Germany and served to promote a common understanding of a broad range of problems.

12. The second expert said various risks arose from technical operations. From practical experience, it was clear that the environmental impact of deep sea mining could be controlled and limited, although the extent to which control could be exercised was not clear. He pointed out that polymetallic nodules on the abyssal plain were fed upon by deep sea marine life and that the density of fauna population in fields with nodules was far greater than in fields without nodules, demonstrating that biological life and nodule growth were interrelated. In his opinion, areas of potential impact included surface discharges and deep ocean disposal sites and that offshore loading could also pose a threat to the marine ecosystem. The expert informed the Special Commission that surface disposal plumes had been studied.

13. At present technical research is focused on more environmentally oriented technology, especially the nodule collector, with a view to testing larger equipment in the coming years. Although exploration activities would have a limited and tightly controllable impact on the seabed and ocean environment, he felt that the impact of modern research vessels on the sea surface could be minimized even further through waste processing technology which yielded an almost zero discharge. It would be ideal, he said for commercial mining, which might be in operation in 20-30 years' time, to be accompanied by environmentally oriented technology and an environmentally oriented mining code allowing for a synthesis of environmental control and mining. It was important that commercial mining should aim to synthesize ecology and economy.

14. He went on to describe a mining scheme involving disposal capacities which would limit environmental impacts. For example a self-propelled collector should comply with the requirements of efficient mining and environmental protection. He suggested that the sediment plume, which could not be prevented, could be reduced by being recycled through the use of a hydraulic device. He pointed out that an experimental self-propelled, auto-controllable nodule collector had been designed for future use.

15. The expert suggested that the sediment plume produced by a self-propelled collector could also be controlled through monitoring and that climatic models of the deep sea ocean would make such monitoring possible. He pointed out that metal separation, smelting and other steps were more or less well established and that their economic and environmental impacts could easily be determined. He stressed that environmental protection must be safeguarded everywhere. Even though a long-term monitoring project would prove to be very expensive it was imperative that it be established and the expenses borne by contractors and the Enterprise. Furthermore, deep ocean floor stations would be required in order to control efficiently the mining of the sea floor, while in addition large areas would require constant monitoring both at the sea surface as well as on the ocean floor.

16. The expert expressed the view that risk assessment would require a balanced system of rules and regulations involving a proper assessment of all interests including those of the contractor as well as those of the Authority. Standards would be required in order for arbitration to be carried out in the case of conflicts. It was also necessary that the rules, regulations and standards should be as flexible as possible and that the mining code should have enough flexibility to permit rather than prevent commercial operations.

17. Following the presentations of the two experts, a number of delegations asked questions and sought clarification on the issues raised. A delegation inquired whether processing of polymetallic nodules at sea was feasible and, if so, whether significant discharge would result from it. The experts responded that present knowledge indicated that there would be no processing conducted at sea. Another question raised was in regard to the impact on the life cycles of higher forms of fish found near the surface of the ocean. The experts pointed out that little research had been conducted on that topic and that research had focused primarily on marine life at the base of the food chain as well as that found on the deep ocean floor.

18. Another question concerned the proposed monitoring stations to be established on the seabed. It was pointed out by the experts that the monitoring stations would observe such physical parameters such as water temperature, flow, chemical indicators and, in future, <u>in situ</u> elements such as heavy metals.

19. Another question raised was whether fauna density was related to surface conditions or to the existence of nodules. In response the experts said that biological activity on the ocean floor did influence nodules but no link could

be established from surface activity. The last question raised was whether manganese processing would be part of an initial operation. The experts replied that it depended on whether it was a three or four mineral operation: a three mineral operation would not include manganese. However, they felt that most operations would involve four minerals (including manganese) since this would be more economically and environmentally sound.

Draft final report of Special Commission 3

Introduction by the Chairman

20. The Special Commission commenced a general exchange of views on the draft final report of Special Commission 3. In presenting the draft report, I endeavoured to explain the status of this document. The report is not intended to constitute the final report of the Special Commission to the plenary. At this point in time it is intended to be a reflection of the progress which has been made in the Special Commission.

21. As stated in the introduction, the object of the report is to provide an overview of the work of the Special Commission in discharging its mandate and to assist delegates in focusing their attention on areas where further work might be desirable.

22. As regards the substance of the report the introductory pages were intended to reflect the results of the discussion in the Special Commission. For more detailed information on the views of delegations and of the discussions, delegations were referred to the relevant parts of the various reports of the Chairmen for each session which were published after consultation with delegations. It is also important to note that the report would still require the attachment in the annex of working papers and conference room papers reflecting the views of various States and interest groups.

23. As regards paragraph 68 of the draft report in which there was reference to a general perception that the Special Commission had only limited time available to discharge its mandate in the most effective manner, this was meant in the specific context of this Special Commission and the rate of work. It took ten years to complete a first revision of each document comprising the mining code with the exception of the documents dealing with production authorizations and accounting principles and procedure. No revisions of the two documents were prepared since it was felt that a consensus which could provide a basis for an integrated text had not emerged in either case.

24. According to the original plan of work of the Special Commission it would be necessary to undertake a second revision of each document. During the same period of 10 years there had been an average of 5.1 States ratifying or acceding to the Convention each year so that the Convention was 83 per cent of the way towards entry into force whereas Special Commission 3 was, in a

quantitative sense, less than half way towards its goal in terms of achieving a draft mining code. These were objective realities which had to be addressed and the draft report was a way to assist delegates in this task.

Views expressed by delegations

25. It was proposed by some delegations to suspend the discussion on the draft mining code at the present time, i.e. after the completion of its first reading and despite the fact that the revised versions of the draft had not yet been discussed. It was felt that during the discussion on the various parts of the mining code it was possible to identify issues and to solve some of them. However it was suggested that it was impossible to reach a final agreement on any of the drafts contained in documents LOS/PCN/SCN.3/WP.6, its addenda 1-8 and the first revisions as long as there was no agreement on the areas of concern in Part XI. Therefore it was felt that it would be appropriate to suspend the discussions in Special Commission 3 and to transmit the draft mining code without any commitment of member States to its present wording to the plenary of the Preparatory Commission bearing in mind the possibility of reverting to this matter at an appropriate time when an agreement had been reached on the areas of concern.

26. A suggestion was also made to annex to the report under discussion not only the draft mining code as it is currently drafted, but also those documents containing proposals for amendments submitted by various States and interest groups.

27. It was felt by other delegations that the term "draft final report" may appear misleading although the report was viewed as the single most comprehensive appraisal to date of the progress of work undertaken in Special Commission 3 since its inception. Therefore it was suggested that the conclusions to which it might lead would form the basis for any subsequent decision on the future of work in the Special Commission. It was pointed out that in that respect, it is fair to say that Special Commission 3 has yet to discharge its mandate under resolution I of the Third United Nations Conference on the Law of the Sea, namely, to draft a comprehensive set of rules and regulations on prospecting, exploration and exploitation of polymetallic nodules in the Area. In the opinion of those delegations, the document currently before the Special Commission would appear rather to be a report on the progress made to date in the Special Commission in considering the various documents comprising the draft mining code but should not be considered to be a final report and should not be construed as such.

28. Concern was expressed over what appeared to be significant editorial omissions in the report especially in regard to the conclusions contained in paragraphs 67 and 68 which were not perceived as the result of previous discussion within the Special Commission. It was pointed out that it was not clear from the conclusions to what extent Special Commission 3 had discharged its mandate nor under what circumstances it could be expected to finalize its work.

29. It was suggested that to claim that no final agreement has been reached on any of the documents comprising the draft mining code would seem an oversimplification at best. It was argued that provisional agreement has been reached on various provisions of the mining code, whereas others remained to be further discussed at the appropriate time. It was also pointed out that some of the working papers discussed in the Special Commission had been reissued in revised form, whereas others had, for the time being, remained unrevised. The point was also made that some previous revisions were undertaken by the Chairman on his own responsibility, while more recent revisions were prepared by the Chairman in direct consultation with the members of the Special Commission and might thus be seen as reflecting a position as close to consensus as it had been possible to achieve. It was felt that that state of affairs did not seem properly reflected in the report.

30. The view was expressed that document LOS/PCN/SCN.3/1992/CRP.17 simply stated that "while progress has been made in identifying and resolving some issues, the Special Commission has not yet reached final agreement on any of the working papers". Therefore it was argued that what was implied in that statement was that all documents comprising the draft mining code were of equal value as working papers the final revision of which had been rendered impracticable, notwithstanding the tentative agreement reached on various issues in the course of deliberations.

31. It was further pointed out that the report went on to state that "there is a general perception that the Special Commission has only limited time available to discharge its mandate in the most effective manner possible". However it was felt by some delegations that this conclusion begged the question of whether Special Commission 3 had or was likely ever to fulfil the mandate entrusted to it. It was the view of those delegations that though it might be claimed by some that a full second reading of the entire draft mining code could extend the work of Special Commission 3 beyond what was reasonable, the report did not clearly reflect the current stage of negotiations nor whether circumstances might warrant further discussion of outstanding issues.

32. As regards the final status of the documents considered in Special Commission 3 in the course of its deliberations the view was expressed that the Special Commission should not forego the option of revisiting previous sections of the draft mining code at some future point, provided that the programme of work of Special Commission 3 at forthcoming sessions of the Preparatory Commission could be adjusted accordingly. It was also the view of those delegations that in the event consideration of the various sections of the draft mining code could not be finalised, the proposals for amendment put forward by various States and interest groups should remain as submitted.

33. It was stated by some delegations that, barring any future development, they would be obliged to reserve their position on the entire draft mining code and to request that all the proposals submitted to date on their behalf be taken into account in any subsequent revision of the mining code and should be incorporated in the revised version of CRP.17.

34. It was also the view of those delegations that, wherever practical, the various contributions made by experts in the course of seminars conducted under the auspices of the Special Commission on matters such as financial terms of contracts and preservation of the marine environment be duly reflected in the report.

35. A number of delegations reserved their right to submit concrete proposals for amending the draft final report at the appropriate time. It was felt that a comprehensive appraisal of the work of Special Commission 3, even if informative and non-binding in nature, would have to serve as a guide to future participants and attempt, to the extent possible, to reflect the history of discussion in the Special Commission and the prospects, as perceived at the time, for the successful conclusion of its work.

III. FUTURE PROGRAMME OF WORK

36. Delegates are requested to submit written draft amendments or suggestions to the Secretariat concerning the report of the Special Commission not later than 15 October 1992 in order to allow adequate preparation for the consideration of the draft report during the 1993 spring session of the Preparatory Commission.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 3 ON THE PROGRESS OF WORK IN THAT COMMISSION

I. ORGANIZATION OF WORK

1. During the 1993 spring session of the Preparatory Commission, Special Commission 3 held 4 meetings, i.e. the 168th to 171st meetings.

2. Following the usual practice, the Contact Group of the Group of 77 on Special Commission 3 matters utilized some of the time allocated to meetings of Special Commission 3 for coordination purposes.

II. ISSUES DEALT WITH IN SPECIAL COMMISSION

Draft provisional report of Special Commission 3

3. The Special Commission completed consideration of the draft report contained in document LOS/PCN/SCN.3/1992/CRP.17, paragraphs 1-68. These paragraphs constituted the essence of the report, as the rest of LOS/PCN/SCN.3/1992/CRP.17 consisted of annexes containing the salient documents relating to the work of the Special Commission.

4. In outlining the agenda for the session the Chairman endeavoured to suggest that the Special Commission should consider the draft report with a view to determining whether it accurately reflected the work done thus far by the Special Commission. The substantive issues were not be subject to negotiation at this session. Since under Resolution I, paragraph 13, of the Third United Nations Conference on the Law of the Sea the Preparatory Commission shall remain in existence until the conclusion of the first session of the Assembly of the International Seabed Authority, it would be premature to formally adopt the report of the Special Commission 3 now. Rather the report should be taken note of now. The question of adoption, as well as the question of any further substantive work within the Commission, would be matters to be considered at a later stage.

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5. Besides the draft report contained in document LOS/PCN/SCN.3/1992/CRP.17 the Special Commission also had before it the addendum to the draft report (document LOS/PCN/SCN.3/1992/CRP.17/Add.1) which contained, inter alia, the revision of document dealing with labour, health, and safety standards. At the time of publication of the draft report of Special Commission 3 in July 1992 a revised text of document LOS/PCN/SCN.3/WP.6/Add.8 had not been agreed upon by all participating delegations. Consensus was reached on a revised text during the further consultations held at the New York session of the Preparatory Commission in August 1992.

6. The addendum also included the documents of Special Commission 3 containing proposals for amendments submitted by various States and interest groups to the Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area.

7. In accordance with the request of the Chairman to delegations to submit written draft amendments or suggestions to the report (see LOS/PCN/L.106, paragraph 36) the proposals by the delegations of Belgium, Germany, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland and comments by the European Community and its member-States were submitted (documents LOS/PCN/SCN.3/1993/CRP.18 and LOS/PCN/SCN.3/1993/CRP.19).

8. The delegation of Brazil, on behalf of the Group of 77, presented comments on the draft report during the discussion of the draft report at the present session. The full text of these comments has been issued as document LOS/PCN/SCN.3/1993/CRP.20. The main points made by the Group of 77 were as follows:

- It was felt that the title of the report was not appropriate, since we should not foreclose the option of returning to previous sections of the draft mining code at some future point, provided that the programme of work of Special Commission 3 at forthcoming sessions of the Preparatory Commission could be adjusted accordingly;

- It was felt that the conclusions contained in paragraphs 67 and 68 of the report were oversimplified and needed to be thoroughly reviewed. Paragraph 67 stated that: "While progress has been made in identifying and resolving some issues, the Special Commission 3 has not yet reached final agreement on any of the working papers." In this respect, the Group of 77 believed that several of the provisions of the draft mining code had in effect met with the approval of delegations;

- Many provisions of Part XI and Annex III were lifted out of the United Nations Convention on the Law of the Sea and inserted into the draft mining code. If we were to suggest that there had been no final agreement on several key provisions of the mining code, that might lead to a harsh and incorrect conclusion that a significant part of the Seabed Mining Regime of Part XI and Annex III were to be understood as outstanding and subject to renegotiation;

- The conclusion in paragraph 68 of the report raised the question as to whether Special Commission 3 had fulfilled its mandate or was ever likely to do so. Though it might be claimed by some that a full second reading of the entire draft mining code could extend the work of Special Commission 3 beyond what is reasonable, the report did not clearly reflect the current stage of negotiations nor whether circumstances might warrant further discussion of outstanding issues.

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9. During the discussion Special Commission 3 agreed upon changes to be introduced into the draft report. These changes are outlined in the following paragraphs.

10. It was decided to replace the current wording of the title "Draft final report of Special Commission 3" with "Draft provisional report of Special Commission 3" and to make consequential changes throughout the text of the report.

11. In paragraph 2, line 1, the words "of the United Nations Convention" were replaced with "adopted by the Third United Nations Conference."

12. In paragraph 3(b), line 2, "para. 1" was replaced with "para. 2".

13. In paragraph 7, line 4, the words "contained in document LOS/PCN/SCN.3/WP.6 and its addenda" were added after the words "working papers".

14. In paragraph 13, line 3, the words "in the discussion" were deleted and the words "as a basis for further discussion" were added at the end of the first sentence.

15. In paragraph 14, line 2, the words "and WP.6/Rev.1" were deleted, and the following new sentence was added at the end of the paragraph:

> "The issues contained in LOS/PCN/SCN.3/WP.6/Rev.1 were taken into account in the preparation of the addenda to LOS/PCN/SCN.3/WP.6".

16. In paragraph 24, line 2, the words "in the discussion" were deleted and the words "as a basis for further discussion" were added at the end of the paragraph.

17. In paragraph 38 the words "as a basis for further discussion" were added at the end of the paragraph.

18. In paragraph 39, line 2, the "and LOS/PCN/SCN.3/WP.6/Add.4/Rev.1" were deleted.

19. In paragraph 41, line 1 the words "by the Secretariat" were added after the words "paper had been prepared."

20. In paragraph 49, the words "as a basis for further discussion" were added at the end of the paragraph.

21. On the basis of the proposal by the Chairman the current text of paragraph 65 was replaced with the following:

> "65. All these issues were addressed in informal consultations conducted by the Chairman. Consensus was reached on a revised text which was issued as document LOS/PCN/SCN.3/WP.6.Add.8/Rev.1 on 15 January 1993."

22. In paragraph 66, line 3 the word "document" was changed to "documents" and the words "and LOS/PCN/L.106" were added at the end of the paragraph.

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23. On the basis of a proposal by the Group of 77, and following informal consultations with relevant interest groups, the text of paragraphs 67 and 68 were replaced by the following:

> "67. By the end of the tenth session of the Preparatory Commission, Special Commission 3 had completed the first reading of the draft mining code on the basis of the working papers prepared by the Secretariat. Some working papers had been revised by the Chairmen taking into account the proposals and positionsput forward by different delegations. Although some issues remain to be resolved, a number of the provisions of the draft mining code have in effect met with the approval of delegations. This report appraises the progress made to date in Special Commission 3 in the consideration of the various documents comprising the draft mining code. It also intends to shed light on the issues that require further consideration."

24. The insertion of the amended conclusion marked the completion of consideration of document LOS/PCN/SCN.3/1992/CRP.17 and Add.1. Special Commission 3 took note of the draft provisional report and recognized it as an accurate reflection of the work of the Commission done thus far.

25. The Chairman would like to express his appreciation for the invaluable assistance of the Secretariat during this and previous sessions of the Preparatory Commission. The excellent and efficient work of Mr. Ismat Steiner and Mr. Alexei Zinchenko deserve particular mention.